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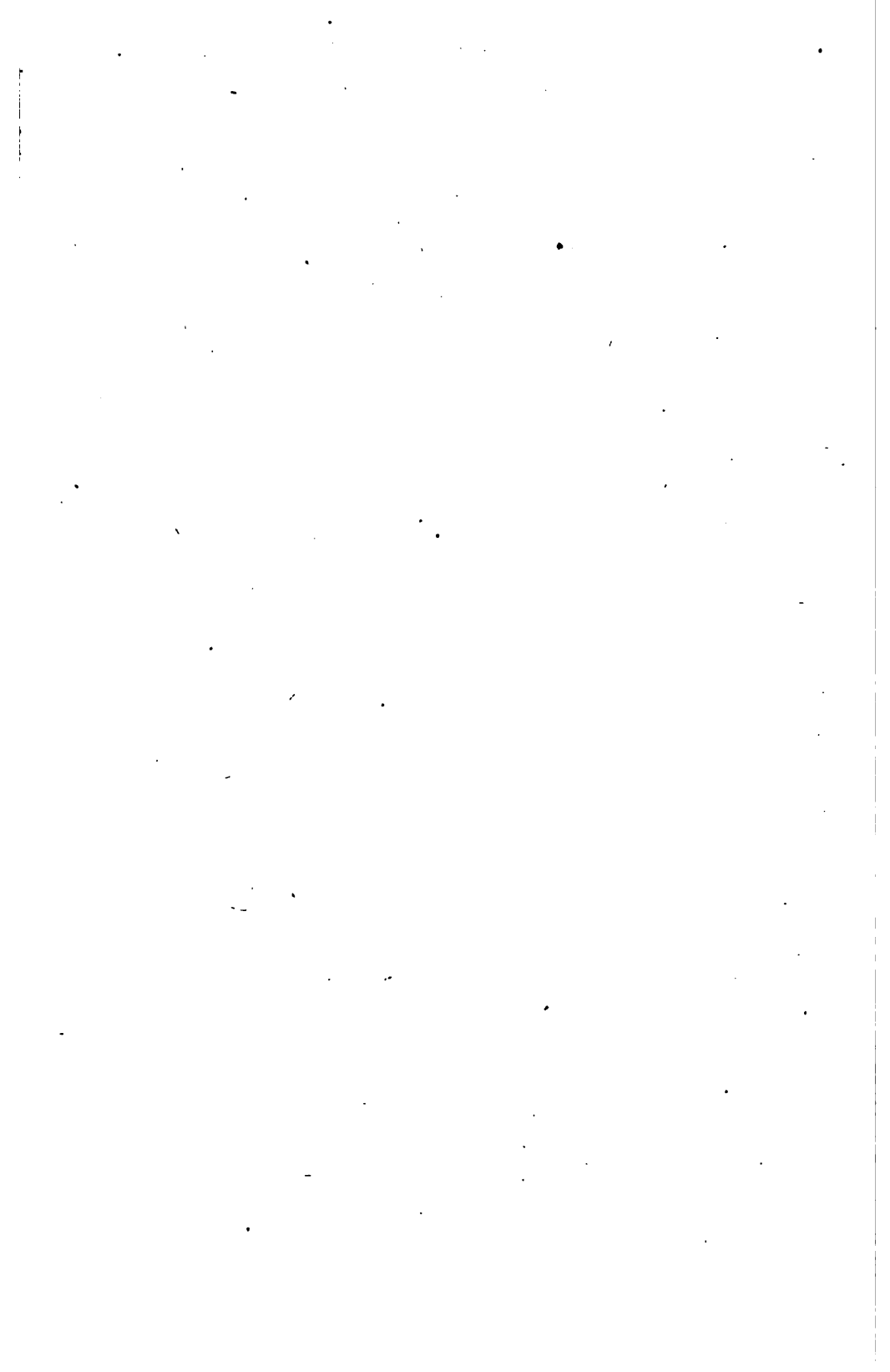
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THE
CANADIAN
LAW TIMES

EDITED BY
EDWARD GILLIS, M.A., LL.B.,
Of Osgoode Hall, Barrister-at-Law.

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SUBJECT - INDEX

To Leading Articles, Editorial Comment, Book Notices
and Reviews, Correspondence and Notes and Other
Matters Contained in Vol. XXXIII. of The
Canadian Law Times.

A.

	Page
Arbitration, the time to test our faith in—William Howard Taft	65
Arbitration, Britain renews demand—Panama Canal Tolls.	212
American Bar Association, Report of	209
American Bar Association, Annual Meeting of.....	514
Alward, Silas:	
Three Great Charters of English Freedom.....	144
Lord Chief Justice Holt	450
The Evolution of Chancery and the Judicial Murder of Sir Thomas More, one of its greatest administrators	655
Attorney-General of Canada v. L'Heureux—Exchequer Court of Canada	700
Aerial Warfare—R. E. Heinselman	741
Airships, passing of over property as trespass.....	749
Annotation, Evolution in—Henry P. Farnham, M.L., in Case and Comment	827
Annotations, the Common Law's debt to—George F. Longsdorf in Case and Comment	832
Annotator's Problem—George H. Parmelee in Case and Comment	938
Adverse Witnesses—Queensland Justice of the Peace.....	1067

B.

Bar Association, Report of American.....	209
Bar Association, Annual Meeting of American.....	514
Bar Association, Manitoba	121
Bar Association, A—A. Jacob Levinson	1027
Bank Act, some observations on the, and Banking as conducted thereunder—Pro Bono Publico	62
Banks and Banking, some further observations on Canadian—Peter Ryan, Esq.	84
Bank Act, the—Editorial	114

	PAGE
Bank Clerks, Employment of—Editorial.....	114
Bank Clerks, conditions governing the employment of—The Labor Gazette	95
Bankruptcy Court, advisability of establishing in Canada, by James Bicknell, K.C.	35
British Columbia, result of recent Law Examinations in...	120
British Columbia Fisheries, In re—Supreme Court Reports.	463
British Citizenship, a common	126
Balkan Question, the—Editorial.....	55
Betrothals and Marriages in Germany—Henry Happold....	912
Bills in Parliament—Editorial	55
Bill of Costs, a model	1064
Boulter v. Stocks—Supreme Court Decisions.....	318
Bombardment of Residential Districts — Percy Bordwell, Ph. D.	799
Ballantine, Henry W.—Is the Doctrine of Consideration senseless and illogical?	412
Betts, Frederick P.—Saskatchewan Statutes	878
Bicknell, James, K.C.—The advisability of establishing a Bankruptcy Court in Canada.....	35
Boston, Charles A., in Journal of Criminal Law and Crimin- ology—A protest against laws authorizing the Sterili- zation of Criminals and Imbeciles.....	972
Bordwell, Percy—Bombardment of Residential Districts....	799
Bowman, Harold M.—Interlocking Corporations.....	382
Budd, J. W.—Schools of Law and Legal Studies.....	1137
Bartlett, C. A. Hereshoff—The French Judicial System....	941

C.

Canada's Federal Constitution, points of special interest in —A. H. F. Lefroy	898
Canada Foundry v. Bucyrus—Supreme Court Decisions....	322
Canadian Rubber Co. of Montreal, Ltd. v. Columbus Rubber Co. of Montreal, Ltd.—Exchequer Court of Canada....	698
Chancery, the Evolution of, and the Judicial Murder of Sir Thomas More, one of its greatest administrators—Silas Alward, K.C.	655
Cross-examination, its benefits and defects—Albert S. Osborn	130
Cross v. Carstairs—Supreme Court Decisions.....	323
Consideration, is the doctrine of senseless and illogical?— Henry Winthrop Ballantine	412
Consideration and Motive as essentials to a binding agree- ment—R. H. Gwynne, in American Law Review.....	591
Commerce and Commercial Law, notes on the history of— Antiquity—Layton B. Register, in University of Penn- sylvania Law Review	492

	PAGE
Commerce and Commercial Law, notes on the history of— Layton B. Register, in University of Pennsylvania Law Review	1078
Contempt of Court in a headline	1198
Contempt of Court, arising out of the publication of proceed- ings, Lord Shaw's Judgment in dismissing prosecution for	483
Contract, Freedom of—R. L. Marshall	542
Criminal Law Amendment Act—Editorial.....	113
Criminal Law Amendment Act	341
Criminal Law Amendment Act, cases under.....	344
City of Toronto v. Bell Telephone Co.—Editorial.....	308
City of Montreal v. Layton—Supreme Court Decisions.....	320
Cobb, Hon. J. Andrew, in Case and Comment—The Police Power	1098
Cole, M. Sandford D.—Maritime Dominion.....	333
Communications	142, 210

D.

Divorce Court in Canada—E. F. B. Johnston, K.C.....	1
Deeds, the execution of	808
Dunn v. Eaton—Supreme Court Decisions.....	136
De Reign, Morrell—History and Development of the Motion for New Trial, and in the Arrest of Judgment.....	516
De Zulueta, F., in Law Quarterly Review—The recent con- troversy about Nexum	844
Del Vecchio, George—Positive Right.....	752
Durfee, Edgar—The Lien Theory of the Mortgage—Two crucial problems	530

E.

Equity and the Common Law—Frank Tudsbury.....	679
Exchequer Court of Canada—	
Felt Gas Compressing Co. et al. v. Willard O. Felt et al.	696
The King v. Crumb	637
The King v. A. O. and C. N. Falardeau.....	697
Canadian Rubber Co. of Montreal, Ltd. v. Columbus Rubber Co. of Montreal, Ltd.	698
Harrison v. The King	699
Attorney-General of Canada v. L'Heureux.....	700
Lapointe et al. v. The King.....	700
Appeal of Wm. Leonard from a decision of Commis- sioner of Patents	1055
In re Gebr Noelle's application for a general trade mark	1056
The King v. Bradburn & Webb	1057

	Page
Edgington, T. B.—Mexico and the Monroe Doctrine.....	709
Ethell, John E.—Liability of Owner of Irrigation Ditch for damages arising from its construction and maintenance	352
Ewart, John S., K.C.—Decisions of Judicial Committee of Privy Council—	
The King v. Royal Bank.....	269
The Judicial Committee	396
Rex v. Grand Trunk Pacific Ry. Co.....	475
Kelly v. Kelly	479
Rex v. Alberta Railway and Irrigation Co.....	577
McHugh v. Union Bank	669
General Summary	673
Editorial—	
The Balkan Question	55
The Panama Canal	55
Bills in Parliament	55
The Proposed Navy Contribution	56
The Panama Canal	110
Criminal Law Amendment Act	113
Bank Act	114
Employment of Bank Clerks	114
National Telephone Co. v. Postmaster-General.....	196
Report of Sir Wm. Meredith on Farmers' Bank.....	196
Taxation	196
German and British Navies	197
Panama Tolls	199
Remuneration of County Judges.....	303
City of Toronto v. Bell Telephone Co.....	308
City of Toronto v. Bell Telephone Co.....	403
Assize Court Sensation	403
Liberty or License	501
Consolidated Rules of Practice	501
Canada's Credit Abroad	617
American Bar Association	689
Lord Haldane's Address	790
Lord Haldane on the Navy	791
Ex-President Taft	791
Address of President Kellogg.....	895
Reprieve of Charles Gibson	896
Law Journal—special issue	1031
Kettle Falls Dam	1031
Canadian Bar	1032
Ontario Bar Association Announcement	1032
Morson v. City of Toronto	1119
Financial Situation	1120

F.

Farnham, Henry P.—Evolution in Annotation.....	827
Foster, Lemuel H.—Building up a Law Practice.....	238
Felo De Se—Wilbur Larremore, in American Law Review..	582
Felt Gas Compressing Co. et al. v. W. O. Felt et al.—Ex- chequer Court of Canada.....	696
Forgery, Detection and Proof of—J. W. Johnson, F.C.A., M.P.	764
Foreign Cases, Notes on recent	740
Frontenac Law Association	119
French Judicial System—C. A. Hereshoff Bartlett.....	941
France—	
Judicial organization in	565
Marriage and Divorce in	446

G.

Gaming Debts, recovery of	1065
Guilmond v. Fidelity-Phoenix Fire Insurance Co.—Supreme Court Decisions	139
Graves v. The King—Supreme Court Decisions	319
Gibson, T. A.—Municipalities and Highways.....	52
Gregory, S. S., in Michigan Law Review—Some reflections on the Law as to Monopoly of Trade.....	1046
Gwynne, R. H., in American Law Review—Consideration and Motive as Essentials to a Binding Agreement.....	591

H.

Haldane, Rt. Hon. R. B.—Higher Nationality	767
Hamilton Law Association	122
Harrison v. The King—Exchequer Court of Canada.....	699
Happold, Henry—Betrothals and Marriages in Germany...	912
Heinselman, R. E.—Aerial Warfare.....	741
Hesseltine v. Nelles—Supreme Court Decisions	137
Highways, Municipalities and—T. A. Gibson.....	52
Higher Nationality—Rt. Hon. R. B. Haldane.....	767
High Court of Justice, in the—Lindsey v. Le Sueur.....	30
History and Development of the Motion for New Trial, and in the Arrest of Judgment—Morrell de Reign.....	516
Holmested, George S.—Lord Alverstone	1024

I.

Indebtedness of Modern Jurisprudence to Medieval Italian Law—Charles P. Sherman	869
International Joint Commission—Kettle Falls Dam— Dissenting Judgment	1169
Judgment	1189

	PAGE
International Law, Current Notes on	907
Interesting Points of Law decided by various Courts.....	346
Interlocking Corporations—Harold M. Bowman.....	382
Invasion, the fear of	866
Investigation of the Farmers' Bank. Report of its organiza- tion, conduct and failure—Sir Wm. Meredith, K.C., M.G.	161

J.

Jottings and Cuttings	731
Johnston, E. F. B., K.C.—A Divorce Court in Canada.....	1
Johnson, J. W.—Detection and Proof of Forgery.....	764
Judges, Remuneration of County—Editorial	303
Judicial Committee of Privy Council—	
City of Winnipeg v. Winnipeg Electric Ry.....	396
Rex v. Grand Trunk Pacific Ry. Co.....	475
Kelly v. Kelly	479
Rex v. Alberta Ry. and Irrigation Co.	577
McHugh v. Union Bank	669
General Summary—John S. Ewart, K.C.....	673
Judicial Records—Sir Frederick Pollock, in Law Quarterly Review	815
Judicial Organization in France	565
Juris Consultus—Trusts and the Law.....	369
Justice, Minister of at McGill.....	124

K.

Kenny, Courtney—Lawyers' Merriments	838
Kelly v. Kelly—John S. Ewart, K.C., on Judgment of Judi- cial Committee	479
King, the, v. Crumb—Exchequer Court of Canada.....	697
King, the, v. A. O. and C. N. Falardeau—Exchequer Court of Canada	697
King v. Royal Bank—John S. Ewart, K.C., on Judgment of Judicial Committee	269
Kline v. Dominion Fire Insurance Co.—Supreme Court De- cisions	138
Klinglesmith, Margaret C.—Stonore Said.....	600
Koch, Felix J.—Law making in the turbulent Balkans.....	568

L.

Labor Gazette, the—Conditions Governing the Employment of Bank Clerks	95
Land Values, Taxation of—Louis F. Post.....	247
Lapointe, et al. v. The King—Exchequer Court of Canada..	700

	PAGE
Larremore, Wilbur—Felo De Se.....	582
Law Associations—	
Frontenac	119
Hamilton	122
Annual Dinner of Moose Jaw Bar.....	204
Annual Meeting of Nova Scotia Bar.....	206
Barristers' Society of New Brunswick Annual Meeting.	207
Report of American Bar Association.....	209
County of York Law Association	210
Law School Examinations—	
Manitoba, December, 1912.....	59
Saskatchewan, December, 1912.....	61
Result of recent in British Columbia.....	120
Law, important points of	426
Law making in the turbulent Balkans—Felix J. Koch.....	568
Law Practice, Building up a—Lemuel H. Foster.....	238
Lawyers' Merriments—Courtney Kenny, in Law Quarterly	
Review	838
Lawyers, New way to make	57
Lefroy, A. H. F.—Points of special interest in Canada's	
Federal Constitution	898
Legal System of Quebec, the—F. P. Walton, Dean McGill	
University	280
Legal Development in England after the Restoration—	
Francis R. Y. Radcliffe	626
Legislation and Legislators—Some Early in Upper Canada—	
Mr. Justice Riddell, L.H.D., LL.D.....	22, 96, 180
Levinson, A. Jacob—A Bar Association	1027
Liability of Owner of Irrigation Ditch for Damages arising	
from its Construction and Maintenance—John E. Ethell	352
Lindsay v. Le Sueur—In the High Court of Justice.....	30
Library, the.....	141, 264, 573, 735, 1008, 1103, 1206
Loeb, Charles G.—Marriage and Divorce in France.....	446
Local Option and its effect on the value of Hotel Property—	
Judgment of His Honor Judge B. L. Doyle.....	702
Lloyd George's Proposals	1102
Longsdorf, George F., in Case and Comment—The Common	
Law's Debt to Annotations	832
Lord Alverstone—George S. Holmsted.....	1024
Lord Chief Justice Holt—Silas Alward	450
Lord Chief Justice, the new	1109

M.

Macnaghten, death of Lord	237
Manitoba Bar Association	121
Manitoba Law School Examinations, Dec., 1912	59

	Page
Maritime Dominion—M. Sandford D. Cole	333
Marshall, R. L.—Freedom of Contract	542
Martin, T. F.—Possession as a Root of Title	1073
Marriage and Divorce, Modernization of	261
Marriage and Divorce in France—Charles G. Loeb	446
McNutt, In re—Supreme Court Decisions	140
Meredith, Sir William, K.C., M.G.—Investigation of the Farmers Bank, Report of its organization, conduct and failure	161
Mexico and the Monroe Doctrine—T. B. Edgington, A.M., LL.D.	709
Michigan Central Ry. v. Daniel B. Vreeland	357
Mikel, W. C., K.C.—Annual Address at the Ontario Bar Association, 1912	15
Monopoly of Trade, some reflections on the law as to—S. S. Gregory	1046
Moose Jaw Bar—Annual Dinner of	204
Morrison v. Pere Marquette—S. C. O.	331
Morson, Frederick M., v. Corporation of the City of Toronto.	1143
Mortgage, the Lien Theory of. Two crucial problems— Edgar Durfee	530
Munby, Frederick J.—Schools of Law and Legal Studies ...	1140
Municipality, power of to prevent Over-crowding on Street Cars—Herbert C. Shattuck, in Case and Comment	1058
Municipalities and Highways—T. A. Gibson	52

N.

Newcastle District, the first years of the Quarter Sessions in and for—William Renwick Riddell, LL.D., etc.....	465
New Brunswick—Annual Meeting of Barristers' Society....	207
Neutral Consuls in War Time	300
Nexum, the recent Controversy about—F. De Zulueta in Law Quarterly Review	844
Nova Scotia Car Works v. Halifax—Supreme Court Decisions	321
Nova Scotia Bar—Annual Meeting of	206

O.

Osborn, Albert S.—Cross-examination, its Benefits and Defects	130
Ontario Bar Association, Annual Address of the President— W. C. Mikel, K.C., 1912	15
Ottolenghi, Salvatore—Scientific Police	715

P.

Panama Canal, The—Editorial	55, 110
Panama Canal Tolls, should the Controversy be arbitrated?	70

Panama Canal Act—	PAGE
Protest by the British Government	77
American Reply to British Protest	81
Britain Renews Arbitration Demand	212
Speech of the Hon. Elihu Root	215
Parmelee, George H., in Case and Comment—The Annota-	
tor's Problem	938
Personal ..58, 114, 200, 310, 405, 510, 618, 705, 863, 919, 1034, 1122	
Piper v. Stevenson—S. C. O.	323
Police Power—Hon. J. Andrew Cobb	1098
Pollock, Sir Frederick, in Law Quarterly Review—Judicial	
Records	815
Post, Louis F.—Taxation of Land Values	247
Possession as a Root of Title—T. F. Martin	1073
Positive Right—George del Vecchio	752
Privy Council Decisions	133. 315
Privy Council, Judicial Committee—Toronto and York Ra-	
dial Ry. v. Corporation of the City of Toronto	1113
Proof by Ordeals among the Romans	797
Proposed Navy Contribution—Editorial	56
Pro Bono Publico—Some observations on the Bank Act and	
Banking as conducted thereunder	62

R.

Radcliffe, Francis R. Y., Legal Development in England	
after the Restoration	626
Register, Layton B., in University of Pennsylvania Law	
Review—Notes on the History of Commerce and Com-	
mercial Law—Antiquity	492, 1078
Revocation of Shares of Residue	806
Rex v. Grand Trunk Pacific Ry. Co., Judicial Committee—	
John S. Ewart, K.C.	475
Rex v. Arthur Pelkey. Supreme Court of Alberta	690
Riddell, Mr. Justice, L.H.D., LL.D.:	
Some Early Legislation and Legislators in Upper	
Canada	22, 96, 180
The First Years of the Quarter Sessions in and for the	
Newcastle District	465
Right of Doleance	1066
Rollitt, Sir Albert K.—	
Schools of Law and Legal Studies	1131
Root, Speech of Hon. Elihu, on Panama Canal Tolls	215
Royal Bank of Canada v. Province of Alberta—	
Judicial Committee of Privy Council—John S. Ewart,	
K.C.	133
Ryan, Peter—	
Some further Observations on Canadian Banks and	
Banking	84

	PAGE
S.	
Saskatchewan Statutes—	
Frederick P. Betts	878
Saskatchewan Law School Examinations, Dec., 1912	61
Scientific Police—	
Salvatore Ottolenghi	715
Scientific Police, School of in Rome—	
Victor Von Borosini	721
Schools of Law and Legal Studies	1130
1. Sir Albert K. Rollitt.	
2. J. W. Budd.	
3. Frederick J. Munby.	
Security—Is a past debt a valuable consideration for?	349
Shattuck, Herbert C., in Case and Comment—	
Power of Municipality to prevent Over-crowding of Street Cars	1058
Shepard, Almond G.,	
Taxes and Prosperity	252
Sherman, Charles P.	
The Indebtedness of Modern Jurisprudence to Medieval Italian Law	869
Smoke, K.C.—Tribute to the memory of the late Samuel... ..	623
Solicitor's Liability as Principal	712
Sterilization of Criminals and Imbeciles, a Protest against Laws Authorizing the—Charles A. Boston, in Journal of Criminal Law and Criminology	972
Stonore Said—	
Margaret C. Klinglesmith	600
Stories of English Law and Lawyers	367
Students, Successful at Osgoode Hall	123
Supreme Court of Alberta—	
Rex v. Arthur Pelkey	690
Supreme Court of Ontario, Appellate Division—	
Piper v. Stevenson	323
Morrison v. Pere Marquette	331
Supreme Court of Canada—	
Dunn v. Eaton	136
Two Mountains Election Case	136
Hesseltine v. Nelles	137
Kline v. Dominion Fire Insurance Co.	138
Guilmond v. Fidelity-Phoenix Fire Insurance Co.	139
In re McNutt	140
In re West Lorne Scrutiny	318
Boulter v. Stocks	318
Graves v. The King	319
City of Montreal v. Layton	320
Nova Scotia Car Works v. Halifax	321

PAGE

Supreme Court of Canada—*Continued.*

Pickles v. China Mutual Insurance Co.	321
Canada Foundry v. Bucyrus	322
Cross v. Carstairs	323
In re British Columbia Fisheries	463
West v. Corbett	555
Stone v. Canadian Pacific Ry.	555
Robinson v. Grand Trunk Ry. Co.	556
Merritt v. Toronto	557
Toronto Ry. Co. v. Fleming	558
McGuire v. Ottawa Wine Vault Co.	558
Peters v. Sinclair	559
Cross v. Carstairs	561
City of Montreal v. Layton	561
Halifax & South Western Ry. Co. v. Schwartz	563
Warren v. Forst	563
In re sections 4 and 70 of Canadian Insurance Act, 1910	1202
In re Incorporation of Companies	1203

T.

Taxes and Prosperity—

Almond G. Shepard	252
-------------------------	-----

Taft, William Howard—

The time to test our faith in Arbitration	65
---	----

Three Great Charters of English Freedom, by Silas Alward, Esq.

144

Toronto & York Radial Ry. v. Corporation of the City of

Toronto—Judicial Committee of the Privy Council....	1113
---	------

Tort to an Unborn Child

1199

Trusts and the Law—

Juris Consultus	369
-----------------------	-----

Two Mountains Election Case—

Supreme Court Decisions	136
-------------------------------	-----

Tudsbury, Frank—

Equity and the Common Law	679
---------------------------------	-----

V.

Van Hise, Dr.—

What the University can do for the State	1013
--	------

Von Borosini, Victor—

School of Scientific Police in Rome	721
---	-----

W.

Warfare under the Sea	805
-----------------------------	-----

Wetmore, Presentation to Chief Justice	126
--	-----

	PAGE
West Lorne Scrutiny, In re—	
Supreme Court Decisions	318
Will discovered after sale by Administrator	934
What the University can do for the State—	
Dr. Van Hise	1013
Workmen's Compensation Laws, simple and effective in	
England	127

Y.

York County Law Association Report	210
--	-----

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No. 1.

A DIVORCE COURT IN CANADA.

To deal properly with the question, whether we should have a Divorce Court in Canada, or remain under present conditions, requires great consideration, and involves discussion of a very difficult subject. It is perhaps needless to state that what I shall say to you on the matter is entirely my own personal view, and does not in any sense pretend to be the opinion of the Bar Association of Ontario. I have been requested to give an address on the subject from an independent standpoint, and having devoted much thought to the many difficulties in the way of a satisfactory solution of the question, I shall endeavour to place before you in a concise and logical form the reasons which have led me to the conclusions which I propose to present to you. Involving as it does, issues of various kinds—moral, religious, national and individual, the subject will be more intelligently dealt with by eliminating some phases which have their origin in the minds of certain classes, but which do not extend to the general public. The exigencies of modern social life and the conditions of a highly artificial and complex system of human relationship have practically changed in later days the relative positions of men and women. What may have once been cogent arguments in favour of a law preventing divorce under any or all circumstances, may not be at all applicable to our present conditions. We find instances by way of illustration in other branches of the law. Combinations which at one time were altogether contrary to law are now with certain limitations quite lawful. Acts which were at one time harmless, have been made crimes by Statute. Many things which a century ago were looked upon as deeds of evil are now treated as ordinary acts in the lives of respectable citizens, and conversely, the pleasures of the past are in some cases treated

as sins in the present generation. It is impossible to fix a uniform continuing standard for many of our motives and actions. It is equally difficult to determine the exact limits of moral conduct. Even in important questions relating to religion, very learned and pious divines have been known to differ. Let us, therefore, eliminate the religious aspect entirely, and this may be done on sufficient grounds, because granting of divorces is an established practice. Whatever our individual views may be, divorces under a recognized practice, and subject to well-defined principles, are granted, and are legal and effective. We must accept this state of affairs as beyond our control. The only enquiry open to us, therefore, is that relating to the *methods* of obtaining a divorce, and the *grounds* upon which it should be given. In order to understand the situation more clearly, I propose to deal briefly with one or two matters which lie at the threshold, and to examine the foundation on which the fabric of marriage rests.

It is generally considered that the marriage ceremony is a contract, but in addition to this, a large proportion of the body politic treat it as sacramental in its character, and hold that the marriage tie should not be interfered with under any circumstances. As I have stated, it is interfered with by virtue of legal authority, and a discussion on any other basis is to a great extent purely academic. We must take conditions as we find them. Indeed, the subject itself which I have been asked to discuss implies the continued existence of a right to obtain a divorce, and thereby to sever the marriage relationship. Omitting, therefore, the proposition that marriage is more than a mere contract, and confining ourselves to the contention that it is partly in the nature of a contract, voluntarily entered into between a man and a woman and made legal by a compliance with existing law, the question forcibly presents itself to one's mind in this way: Why should not such a contract be annulled just as any other legal and binding contract may be annulled by a Court of law, if the circumstances and conditions be such as to warrant the Court in so doing? I am not now dealing with the point as to what such conditions ought to be. I shall have something to say about that later on, but for present purposes I ask if any other lawful contract can be voided by legal interposition, why not this one? I shall endeavour to give reasons why it should come within the scope of the law regarding con-

tracts generally, but it appears to me that we have first to consider some other elements before answering the question I have just submitted for your consideration.

One element is that marriage is more than a contract. It is a status or condition of civilized social life carrying with it certain limitations and qualifications. When individuals marry, they enter on an entirely different phase of life, and are governed by a new relationship to human environment. The man is no longer a free agent. His actions are governed by new and different principles. He is not at liberty to roam at large. His duties are entirely changed, and his obligations assume a new character. Socially, he is bound to respect his wife, and properly maintain her and his family, or he must lose caste with his fellow-citizens, and may become amenable to the law. His status in certain respects with regard to women other than his wife is absolutely reversed. Even his outgoings and incomings are circumscribed, and he finds that the perspective of his life is shifted by reason of the new condition in which he finds himself. So it is also with his wife. She no longer finds her friends as before, perhaps entirely outside the husband's circle. Her marriage has removed her to another plane, and her outlook is towards a new horizon. Many things she cannot any longer do, and many others she may now do, which were outside the sphere of spinsterhood. Both parties have drawn apart from former surroundings and have formed an entirely new relation. But for the moral law, aided by the law of the country in which they live, they might have acquired this status without the marriage law or ceremony at all. Now, if this condition in which they find themselves becomes intolerable, why should they not be restored to their original position? Does the contract make it any the more imperative that they should be compelled to lead lives of misery, ending in death as the only relief? They may voluntarily separate, why not legally? They changed their status voluntarily, and without any obligation to the law in doing so. The law permits them practically to separate and live apart, as if they were unmarried, except that the restraint of the marriage tie remains, and marriage with another cannot be entered into. In other words, nearly all the practical results of single life with its so-called freedom and relief from domestic trouble and responsibility may be obtained by an agreement between the parties. Morally and socially they are divorced, and yet they must continue to be bound to each other

by a bond which requires in Canada the united power of the Senate and Commons to sever. Regarding such a state of life, it may be fairly argued that having done all the damage possible to the marriage relationship, having destroyed the peace and union of a family, and having opened the door for scandal and endangered the reputation of both parties by making a separation valid and enforceable, the law might go a step further, and as a surgeon with his knife cuts away the diseased tissue to save the limb, so might the Courts be empowered to operate on the moral and domestic relationship of husband and wife, and thereby save whatever of honour, virtue or respect might be found in the wreck of two lives.

But it will be said that the sanctity of the marriage tie must be protected. That this is right and necessary must be freely admitted. But what do you say about a case where the husband or wife, or both, have themselves degraded the marriage obligations, defiled the sanctity of the marriage relation, and rendered life unbearable and disreputable? Take the usual evidence in alimony actions, to say nothing of the graver facts in divorce cases. Open and notorious misconduct of the gravest character; cruelty, contempt and antagonism down to the minutest trifles of life; absolute want of sentiment; constant quarrelling with each other without any regard or consideration; actuated by the coarsest and most vicious feelings, and every day of life treating one or the other of them as entitled to less kindness or sympathy than a person would shew towards his dog or horse; given this not uncommon state of affairs, and then consider that such relationship may and likely will continue through many years until a tribunal beyond the Courts of law cuts the tie and gives relief to one of the parties, and perhaps to both. I do not exaggerate the circumstances to which I have referred. Judges and lawyers know the unfortunate condition in which married life sometimes finds itself. The average citizen knows but little of these matters. What comes to him is only the scandal. The suffering and inner life are not revealed until laid bare in the witness box. And knowing what we do, does it not appear to us as mere words when we hear people argue strenuously that the sanctity of the marriage tie must be maintained at all cost, notwithstanding the fact that the parties bound together by it have so degraded it as to make it the symbol of physical bondage instead of the badge of purity, and the emblem of happiness.

A strong argument in favour of divorce is, in my judgment, the danger resulting from legal or other separations without dissolution. The parties to such arrangements are practically neither married nor single. The man who leaves his wife under any circumstances, goes back to the world under a cloud, justly or unjustly, according to the facts. His future conduct in time becomes a matter of no great consequence. In many instances he leaves his country, goes elsewhere, gets an irregular divorce and marries again. So with the wife, who, neglected and forsaken, meets with so little sympathy or assistance even from her own sex, that she too degenerates owing to the want of a sustaining moral force. She may fall into straitened circumstances, temptation may become too strong, and the result is what might naturally be expected. One family legitimate, but deserted and handicapped through no fault of theirs, and two human derelicts, living irregular lives, and perhaps responsible for children who have neither name nor heritage, is the story told in most cases of the husband and wife, who ought to be absolutely and judicially separated, but who are compelled to drag along in chains which a professedly moral world says are not to be interfered with. The rich man knows nothing of the pangs of hunger and poverty. The good man knows little of the depth of degradation into which many of his fellow-men have fallen. The husband and father, whose life is one of peace and domestic happiness, cannot understand the terrible ordeal a frail, delicate and sensitive woman may have to undergo at the hands of a brutal husband, or what a husband suffers through the neglect and infidelities of a reckless wife. The evil results of such conditions are felt most keenly by those who have no means of indulging in pleasure of any kind. Engaged all day in labour or business drudgery, the return each evening to what is misnamed home, is accompanied by or is met with a repetition of violence, abuse and suspicions which have destroyed the sympathy and kindness of the earlier years of married life, if such feelings ever existed. Escape by legal means from this daily and hourly life of misery is practically impossible to people without money. Drink is indulged in as an antidote to the domestic poison, but this only aggravates the disease and often ends in crime. The rough outline of such lives is all that the world knows or sees. The sins of the erring wife or the brutality of the husband are never fully known to the public. A Divorce Court alone can shew

something of the facts following an unfortunate marriage, but the whole truth of domestic unhappiness cannot in any case be fully expressed.

I say, therefore, that there are many cases in which relief of a permanent character should be given. If this proposition is granted it then becomes only a matter of prudence and wisdom as to how far and on what grounds relief may be open to those whose claims come within the general class of cases deserving remedial action. It is however argued that it is better that such things should be than that the door should be opened to divorce proceedings, and it is also contended that by opening the door, the general tone of morality and the standard of married life will be lowered. The result in the United States is pointed to as evidence of this, and it is said that in that country marriage has lost its significance, and the ideals of home life have been shattered.

In this connection I would like to deal with the statements so frequently made regarding the divorce laws and methods in the United States. One of the most common arguments used by those opposed to a Canadian Divorce Court is the one I have just mentioned, namely, that marriage is not only a failure in the United States, but is practically disregarded by a large proportion of the people, and that this condition has been brought about by loose divorce laws and procedure. Is this allegation correct? If so, it is entitled to great weight. What do the facts and statistics shew? We can arrive at no reasonable conclusion as to the proportion of divorces to marriages. It is assumed by some writers to be as one to fifteen. As to this, it is clear on examining the facts that no such proportion exists, having regard to the method of calculation adopted by such writers. In the first place, there is no record of marriages kept in at least one-half of the States, and no means of finding out the correct figures. There are hundreds of thousands of immigrants to that country every year, mostly married, of whose marriages there is no record, except in Europe, or some other continent. Under what is known as Census Reports, all judicial separations, conditional decrees, and all cases in which the marriage is declared a nullity from the beginning are included under the heading "Divorce." And I venture to say from facts which have come before me in the course of my practice, that the number of Canadians who acquire irregular and fraudulent divorce in the U. S. is ten times greater than the total number of divorces granted

in Canada. We should consider the important fact that the comparison is not sound, because in many of the States, divorces may be granted on very trivial grounds, which are not contemplated or advocated in this country. Even with this fact to aid us, it is a singular circumstance that in some States where the causes are both slight and numerous, the increase of divorces is not marked, and that in New York State, where adultery is the only cause, the increase is greater and steadily growing. The causes vary in the States from adultery to "causes deemed sufficient by the Court" as in Washington State, and we find the same want of uniformity in practice as we do in Canada. That is accounted for to some extent by the fact that each State deals independently with the subject.

But I think there is a broader ground than mere statistics on which the question can be put. We have not as yet the dense commercial centres we find south of our boundary. There is not that restless and changing spirit which actuates so many American citizens. The substitution of business rush for home ideals, the desire to make money quickly, the mode of living in hotels and rooms, the growing tendency towards travel and variety, impatience of restraint, and perhaps more than we are aware of, the absolute individual independence of the man and woman, and the freedom of both married and unmarried life, all these must be important factors in considering the present state of divorce laws and their effect in the United States. Except in the case of very large cities, and looking at the country as a whole, there is no ground for saying that the general morality of the American citizen, farmer, artisan or business man is lower than it is in any other country. We have only to look at such places as Italy or Spain where no divorces are permitted, and where morality is at any rate no higher than it is in America, to realize that divorces are not the cause of the low moral tone of any country.

The want of uniformity in Canadian divorce law is one of the strangest features in an otherwise reasonable Constitution. In British Columbia there is a Divorce Court based somewhat on the principles of the English law, under the Act of 1857. Courts for granting absolute divorces were established in New Brunswick, Nova Scotia and Prince Edward Island before Confederation, and these were continued by sec. 129 of the B. N. A. Act, 1867. Ontario, Quebec, and

the remaining Provinces of the Dominion are without Courts of Divorce, and the application for relief must be made to Parliament, both bodies having to pronounce the dissolution of the marriage obligation, which is done by a hearing of witnesses before a Senate Committee, and if a proper case is made out, this is followed by a private Act of the House of Commons. It is certainly one of the most remarkable anomalies in the history of Constitutions. The exclusive right to legislate on marriage and divorce is given by the British North America Act, 1867, to the Parliament of Canada, and yet notwithstanding the B. N. A. Act, there is no uniformity of the law, and the right is, as I have stated, exercised under a saving clause by several of the Provinces to the exclusion of Dominion authority. Quebec, then Lower Canada, a Province opposed to divorce laws, was the cause of this anomalous condition of things, although I have no doubt Upper Canada was as a whole disinclined at that time to deal with the question of establishing Courts of Divorce in this country. Owing to the state of the law now in force here, a grave injustice is experienced. There is in respect of divorce, one law for the rich and another for the poor. This may be said to be inaccurate. It is so, theoretically, but in practice, it is undoubtedly true. In ordinary litigation, care has been taken to bring the place of trial of both civil and criminal cases to the doors of the litigants. Judges travel from one end of each Province to the other, twice a year and more often in some localities, in order that the poor man may have justice on the same terms as his richer neighbour enjoys. A ten dollar Division Court case takes a County Judge thirty miles from the County town in order that a trumpery dispute may be settled according to law. Actions within the jurisdiction of the County Court, and larger issues requiring the aid of High Court Judges, are disposed of at the County towns in almost every County in the Dominion. Magistrates are provided in every school section to dispose of troubles of a petty character. And yet with all this expense and care in matters largely of a momentary and temporary nature, the unfortunate woman who is grossly wronged, and is being slowly yet surely battered to death, or the equally unfortunate man who is bound to an adulterous wife, has to travel perhaps thousands of miles to get relief, and can get it only by a slow, tedious, and expensive process. This state of affairs is a blot on the administration of justice in a civilized country.

If the party is poor, justice cannot be had. Only the rich can avail themselves of our present system of granting divorces. And let me remark in this connection that the remedy is practically denied by force of circumstances to those upon whom the burden lies most heavily, and in respect of whom the most dangerous and immoral results are most likely to follow. Money, under the circumstances which give rise to divorce, affords relief in the way of travel, change of residence and other means of escape, but poverty drives both the man and woman to desperate deeds, and to a still more desperate condition of immorality and degradation.

Having thus briefly touched on some of the conditions with which we have to deal in this discussion, I wish to call your attention for a few moments to the subject of divorce in its legal aspect, and the remedies which in my opinion ought to be provided to meet present conditions. It may be useful to see what has been done in the past history of England towards a solution of the problem which confronts and has for centuries confronted thinking men and women. I do not hope to say anything original in this connection, but if I can direct your minds to some new line of thought, or create a new phase of reflection, and analysis, I shall be fully satisfied that my work has not been in vain.

First, let me take up the record. It has always been admitted that the wrongs suffered by the innocent partner in matrimony are entitled to some remedy. The Ecclesiastical Courts had the earliest jurisdiction. In the very early days in England, these Courts took upon themselves, or acquired the power to grant a divorce, *a mensa et thoro*. Although marriage was looked upon as indissoluble, there grew up various schemes for declaring the marriage a nullity *ab initio* on the ground that an impediment of relationship existed. This is described by a well-known writer as a "relationship which might consist in some remote or fanciful connection between the parties or their god-parents." Later on, and particularly after the Reformation, resort was had to Parliament for private acts authorizing divorce and permitting re-marriage owing to the fact that there were no Courts having jurisdiction to decree a divorce *a vinculo*. This remedy was adopted by no less a person than Royalty, in the case of Henry VIII. The first Private Divorce Act related to the Marquess of Northampton, whose re-marriage after a decree of separation by the Ecclesiastical Court was declared

to be valid by a Commission under the Archbishop of Canterbury. This was further confirmed by Statute, and indeed it was accepted law that a Statute was necessary. Acts of Parliament became more frequent in the 17th and 18th centuries until 1798, when Lord Chancellor Loughborough succeeded in getting certain remedial orders passed by the House of Lords. Applications for absolute divorce had under this new practice to be founded on Ecclesiastical decrees and verdicts at law in criminal conversation actions, or good grounds shewn why such verdicts could not be obtained. The ground was adultery. A Royal Commission sat and reported. It was felt that a gross injustice was being done to the great body of the people who could not afford the costs of these expensive proceedings. As a result, the Act of 1857, known as the Matrimonial Causes Act, was passed. During the discussion on the Bill, the Attorney-General stated that the object was to create "a new tribunal which may hereafter have to administer other laws made under happier auspices." The new Court was composed of several Judges, but subsequently power was given to a single Judge. The sittings were to be held in London, Middlesex or elsewhere, but the latter provision was never carried into effect. The Act was amended at various times, and now the position of matters is that a husband may obtain a complete divorce on the ground that his wife has been guilty of adultery since marriage, but a woman can only get relief by shewing that the husband has been guilty of adultery coupled with such cruelty as without adultery would have entitled her to a divorce *a mensa et thoro*, or adultery coupled with desertion, without reasonable excuse, for two years or upwards. There are four additional crimes named in the Act, each being of a grosser type of the same class, any one of which entitles the wife to an absolute divorce. But although the English Parliament has provided a certain degree of relief, it has been found that only people of means can avail themselves of the remedy, and the poor are still in the same hopeless condition as they were before the Act of 1857 was passed. As a result of public agitation, a Royal Commission was appointed in November, 1909, composed of very eminent men, who have made a thorough enquiry into the whole matter, and who have just lately presented their report, a copy of which I have read with the greatest care. The remedies and provisions suggested are of a very drastic and perhaps far-reaching character. I do not think all of them would be

favorably received in this country, so I shall not deal with them in detail. Apart from various grounds on which a separation is recommended, the Commissioners find that in their opinion the law should be amended so as to permit of divorces being obtained on the following grounds: 1, Adultery; 2, Desertion for three years and upwards; 3, Cruelty; 4, Incurable insanity after five years confinement; 5 Habitual drunkenness found incurable after three years from first order of separation; 6, Imprisonment under commuted death sentence. A number of grounds of a less serious character are named as being sufficient to support a judicial separation. A minority report was made, which I understand has received approval from a very high quarter in England. The minority report is that of the Archbishop of York, Sir William P. Anson, and Sir Lewis T. Dibdin, which, differing on several grounds from the majority, agrees with some of the radical changes recommended by a large body of the Commissioners.

Looking at the character of these various grounds suggested for divorce, I am unable to see that any one is much less serious than the others. Adultery on the part of a married woman has always been treated as a sin of the gravest character, but the conditions of social life have caused it to be considered less seriously on the part of the man. I am not concerned with the illogical result of such a situation. That it is so is sufficient for my contention. Continued desertion is as much a breach of the marriage obligation as adultery. Persistent cruelty may and often is the cause of greater suffering to the wife than anything else can be, and nothing can so degrade the relationship of man and wife as habitual drunkenness. Incurable insanity renders the afflicted incapable of performing the obligations of married life, and along with drunkenness generally visits the sins of the parents on the children of succeeding generations. Imprisonment for life under a commuted sentence is, in fact, a divorce to all intents and purposes from the marriage point of view. Wherein can we make a logical difference in the result? The man guilty of any of these crimes or subject to any of these conditions is not the man who entered into the state of matrimony. He is a different individual in relation to his wife, and no longer remains the same person as regards the original status which he and the woman created. A trustee is removed if he becomes insane, and the tie of guardianship is severed if the guardian is guilty of cruelty to his ward. A

grossly immoral life is ground for annulling the tie which binds the clergyman to his church. Desertion compels the husband to pay alimony to an innocent wife, and sufficient cruelty warrants her in living wholly apart from the man to whom the law has bound her by every legal means in its power. Why should the law grant only a partial remedy in cases of this kind? Why not grant complete relief when grave wrongs are admitted to exist, and great danger likely to result from the continuance of a condition condemned by the law and only feebly remedied? Social and sentimental reasons do not affect the question. Divorce is not the cause of the looseness of married life. Rather it is the logical outcome of wicked and sinful men and women, whose immoral lives are the result of a licentious and unholy system of living and a condition springing from the corrupt and degenerate tendencies of humanity. Society has much to answer for in this connection, especially when we find, as we do, that apparently a large and influential class, instead of dealing out justice to the sinner, winks at his lapses, and welcomes him as a family guest. The remedy does not lie in *preventing* divorce. The true remedy consists in an exaltation of life.

For my own part, I am induced for the reasons therein given to follow the report of the majority in its main features, and I cannot see that the enlargement of the causes for divorces along the lines indicated would produce the evils which some people think would result from the changes proposed, if carried into effect. The state of the divorce laws in the United States is not relevant. The conditions are entirely different, and the easy methods of getting a divorce in many of the States are not contemplated here. We look only for sound, conservative and substantial grounds on which a divorce may be granted, and not for the creation of a Court too readily available to the man or woman who is tired of married life, or whose respective tempers may not harmonize, nor should we advocate remedies so difficult and costly as to make the Court a millionaire's tribunal.

This brings me to the question of the constitution of the Court itself. It is manifest that on the trial of issues of pure fact, Judges who are experienced in weighing evidence are best qualified to deal with matrimonial causes. Many of the members of the Divorce Committee of the Canadian Senate are laymen. They are engaged in business or callings which are quite foreign to the conception and consideration of the pro-

bative force of evidence. A few hours of each session, and an experience only extending over the time they have been members of the Senate, represent the training available to them, and it cannot be expected that they could analyze, weigh and estimate the value of the statements made by witnesses as a Judge can do in the light of varied and daily experience, or with that knowledge and penetration, which are the product of half a lifetime at the Bar, and later, on the Bench. It is true there are lawyers on the Committee, but there is not, and cannot be the same searching enquiry, the same judicial quality which we expect and get from the trained and experienced jurist.

I have, therefore, come to the conclusion that we should have a purely judicial tribunal for divorce cases, composed of at least three Judges, in order to lessen the danger of unconscious reasoning of a dogmatic tendency. They should be of the Province in which the parties to the marriage reside, and on any legal question there should be the right of appeal to the Supreme Court of Canada. Each Province should be divided into districts, and the Court should sit as often as expedient for the hearing of causes. They should also have power to deal with separation on well-defined grounds, as set out in the Report to which I have referred. If this method were adopted, the Court would be available to the laborer as well as to the millionaire, and there would be practically a certainty of justice being done without any danger of the heavens falling. The procedure should be of the simplest and least expensive character, and power ought to be given to the Court to assess in favour of an innocent wife reasonable damages against her husband. The rules of evidence should be stringently applied, and the strictest proof of the merits should be demanded when the case is being tried, whilst the cost and means of getting to trial should be moderate and within the reach of worthy suppliants seeking only justice.

What other suggestion may be made? There is one of importance, and I think of great value, although I hesitate to advance it at present, because it might tend to weaken my main contentions in the minds of some of those who on the whole may agree with me. It is this: In every case where the husband is found guilty of the offences, or any of them, which warrant an absolute decree against him, and a dissolution of the marriage, a punishment ought to be imposed. Let us compare other conditions of the law with the misdeeds

which ought to warrant a divorce. A violation of a snow by-law carried with it a fine. A trifling matter from a moral standpoint may be ground for imprisonment. The stealing of a loaf of bread for a starving family sends a man to gaol. Yielding to temptation and taking some trifling article from a bargain counter is penalized by perhaps a month in a cell. But the gravest of crimes against the Divine laws, and a vicious defiance of the well-recognized principles of morality are allowed to go unpunished and treated as a matter only of scandal and idle gossip. There should be some deterrent, some dread of the future consequences ever present to the mind of a man who has taken a young girl from her home under a promise to protect and provide for her as a wife, and who, in violation of this, has used her as an unresisting object on which he could vent his anger and exercise his cruelty. If proved, why should not the tribunal have the right to punish? A witness who clearly commits perjury in the box is dealt with at once, and a Judge orders that he be forthwith arrested and prosecuted for the crime. Half a dozen serious crimes may be proved on divorce proceedings, but the man goes free and a judgment is given, a Committee's report is made or a private Act passed, granting him that result which but for his own misconduct he would perhaps have cheerfully applied for on his own account.

I do not think there is anything more I could say to advantage. I believe as much as any one does in the sanctity which ought to exist in connection with the marriage relation, and the care we ought to exercise in dealing with the question I have discussed, but in a matter of this kind, if that sanctity has been desecrated by either husband or wife, or by both, it no longer exists, and the marriage relationship is a hollow mockery and a thing defiled. And when it is found by proper judicial enquiry that one of two lives is blasted and that death itself would be a relief, it surely cannot be argued that a tribunal which pronounces bare justice is acting contrary to the laws of God or the higher principles of modern civilization.

ADDRESS OF W. C. MIKEL, K.C., OF BELLEVILLE,
PRESIDENT OF THE ONTARIO BAR ASSOCIATION,
AT THE ANNUAL MEETING OF THE
ASSOCIATION, 1912.

SIX YEARS' EXISTENCE.

The Ontario Bar Association has completed the sixth year of its existence, and while the past six years may be regarded as a formative period, still the Association has justified its existence even during this struggling period of infancy by achievements that would do credit to an older and stronger organization.

It has been fortunate in having Sir Mortimer Clarke, Sir J. M. Gibson, and E. F. B. Johnston, K.C., for Honorary Presidents, and A. H. Clarke, K.C., M.P., of Windsor, Hon. Mr. Justice Hodgins (before being called to the Bench) and Mr. Charles Elliott of Toronto, and S. F. Lazier, K.C., of Hamilton, for Presidents. With such men as these as its head, failure was impossible.

CAME BY EVOLUTION.

It did not come into existence suddenly and meteorlike, but came by the slow and natural process of evolution. In what may be called the embryonic stage (a period of gestation of nine years) delegates from the various County Law Library Associations once a year journeyed to Toronto to discuss matters of interest to these organizations, but it was soon found that there were many topics of interest to the legal profession generally outside of the scope of the County Law Library Associations, and which needed also representatives from counties where there were no such Associations.

STARTED WITH FIFTY MEMBERS.

The formation of a permanent organization of the members of the legal profession for the Province was discussed from time to time at these meetings, and as the year 1906 was drawing to a close the Ontario Bar Association was launched with about fifty members. So well has this step been appreciated by the lawyers of Ontario, that the membership has increased to over five hundred and the Association

has developed into a force of great strength and activity, capable of exercising a useful influence in the Province generally.

NOT A UNION TO KEEP UP PRICES.

The Association is a factor that must be reckoned with, if for nothing else than because of the unselfishness of its aims. The members are not banded together to compel the public to employ only themselves or restrain each other from rendering their services below a fixed price. The Ontario Bar Association has no object except that which is for the benefit of the whole people.

LAWYERS' UNION DIFFERS FROM ALL OTHER UNIONS.

There is nothing in the rules of the Association or in the regulations governing the legal profession generally, that prevents a lawyer giving his services for as small a remuneration as he wishes or for no remuneration if he chooses. There are however stringent provisions preventing him from charging more than the fixed scale of costs. In these respects lawyers' unions differ from all other trusts, combinations and unions of the present day, which prevent their members charging less than a fixed amount but permit them to charge as much more as they like, and therefore have for their chief object enhanced prices, which necessarily increase the cost of living.

LAWYERS NOT RESPONSIBLE FOR INCREASED COST OF LIVING.

The legal profession cannot be charged with having contributed to the increased cost of living which has in recent years featured so largely, as the scale of costs now in force has been practically the same for the last twenty-five years.

LAWYERS ENTITLED TO THE GRATITUDE OF THE PUBLIC.

There is no other class which has done so much for the public. It is the lawyer who is in the forefront of every great struggle for liberty. It is the lawyer who has overthrown the tyranny and oppression of monarchs, oligarchies, and powerful classes. It is the lawyer who has guided barbarism along the treacherous march to civilization. It is the lawyer who has made the great power of the press possible. There is no community in which the people are in such abject control of

designing, powerful and cruel interests as the one in which there are no lawyers. They have to do with the weightiest questions of life, liberty and property. In the business world employees deceive their principals, partners deceive each other, one set of shareholders conspire to wreck the interests of the other, husbands deceive their wives and wives their husbands. But lawyers, though possessing the business, domestic and other heart secrets of their clients, the disclosing of which would bring disaster, have never been known to sell their clients. With it all they are the poorest paid class in the community. Chief Justice Brewer of the United States Supreme Court said the history of lawyers is to work hard, live well and die poor.

LAWYERS BROUGHT TOGETHER BY THE ASSOCIATION.

One of the objects of the Ontario Bar Association is to bring lawyers together for sociability as well as the discussion of subjects of interest to the profession. Never has there been a time when so many members of the legal profession gathered together and at such frequent intervals, never has there been a time when the members throughout the Province generally were so well acquainted with each other, never has there been a time when so much discussion has taken place on subjects of such great importance, never has there been a time when the members of the profession have had the advantage of listening to so many interesting and useful papers prepared and delivered by lawyers and Judges of eminence, as since the inception of the Ontario Bar Association. The intercourse of lawyers has not been confined to this Province. Lawyers from other Provinces of the Dominion and from the United States have attended our meetings and left behind them words of wisdom and food for profound thought. Representatives from our Association have returned these visits and brought back reports full of interest.

So that if the Association had accomplished nothing else in the last six years, its existence is fully justified by the above results.

During last year it has also, through its committees and members, devoted a great deal of attention to the new Consolidated Rules and High and County Court Tariffs, soon to be given to the public. Law Reform and General Legislation have been considered in a more thorough and systematic man-

ner by the profession than ever before, and now that the several standing Committees having charge of the various departments of Law Reform, of Legislation, of Legal Ethics and of History, have become somewhat accustomed to their work, the Association will acquire an influence never before enjoyed by any such organization in the Province.

RELATIONS OF THE BENCH AND BAR MORE CORDIAL SINCE THE O. B. A. WAS FORMED.

At no time have the relations between the Bench and Bar been so well understood and so cordial as since the Ontario Bar Association was formed. Judges have come to our gatherings and in the most friendly and brotherly way pointed out our faults and admitted their own. In passing it might be well to remind lawyers of the necessity of keeping constant watch for that fault which is ever ready to creep insidiously upon us, that is, coming into Court with an unprepared case. It has a most pernicious influence upon the lawyer himself, is dangerous to the client's interest and annoying to the Judge.

The Hon. Mr. Justice Middleton, the Hon. Mr. Justice Kelly, the Hon. Mr. Justice Hodgins, and His Honour Judge Denton, having been called to the Bench, and Mr. Donald McIntyre, K.C., having been appointed Chairman of the Ontario Railway and Municipal Board, all since our Association was organized, removes from active participation in our work, gentlemen who have rendered splendid service to the Association. While these appointments mean to us a heavy loss, we are consoled with the thought that they constitute a distinct gain to the Province as a whole.

SIR CHARLES MOSS.

The circumstances which gave rise to the appointment of the Hon. Mr. Justice Hodgins (a former President of our Association) to the Court of Appeal remind us of the sad loss to the Bench, to the Bar and to the Province as a whole occasioned by the death, since we last met, of Sir Charles Moss, late Chief Justice of Ontario. He was respected by all, for his high character, admired for his ability and erudition and loved for his kindly and gentle nature.

LAW REFORM ACT, PART I.

The great outstanding feature of importance to the lawyer during the past year is the Proclamation bringing into force

Part I of the Law Reform Act, ch. 28, 9 Edw. VII., by which there will be but one appeal from a judgment within this Province, and that appeal made easier and perhaps less expensive than the present appeal to the Court of Appeal. It is to be hoped the highest expectations of its supporters will be realized.

ALL GREAT PROBLEMS OF THE PEOPLE ULTIMATELY COME TO THE LAWYER TO BE SOLVED.

There are some great questions which the Canadian people are facing, the correct attitude as to which, and the correct administration of which, will greatly affect the future of our Province and of the Dominion. They are Public Ownership, the form of Municipal Government, and the System of Municipal Taxation. All great problems of the people ultimately come to the lawyer to be solved and these will form no exception to the rule.

PUBLIC OWNERSHIP.

The demand that is uppermost in the public mind to-day is Public Ownership. People have seen the evil effects of great interests and valuable franchises being handed over to private corporations, and they are willing to accept whatever defects there may be in Public Ownership, only to again get control. It is needless to say to the lawyer that while the principle is sound, constant vigilance is necessary to guard against dangers quite as odious as the worst effects of ownership by private corporations.

MUNICIPAL GOVERNMENT.

No class of law comes as close to the individual as that emanating from the municipal governing bodies. We have had municipal government by Boards of Magistrates, and the direct voting of the people at the Town Meeting, later by Councils, elected by Wards or the General Vote System, then the Board of Control, and last by a small paid elected Council called a Commission. One municipality in the United States has proposed to hand over the whole business of the town to a manager. After all it is more a matter of men than of system, and the system that will produce the best men will give the best results. It is generally conceded that none of the

systems tried in Ontario have produced the best results. If the position of municipal legislator is made sufficiently attractive, as to length of term and remuneration, to induce men to specially qualify themselves for the position, in other words, if the office of municipal legislator or manager becomes a special calling by itself, much better results will follow. On the legal profession, and on the legal profession almost alone, will devolve the responsibility of adopting the best system, and then working it out.

MUNICIPAL TAXATION.

Municipal taxation is about the only kind of taxation people appear to feel or to which they give much attention in this country. Any system of taxation will not of itself reduce the amount of taxes paid by a community. From time to time different classes of the community endeavour to shift the burden of their taxes from themselves to some other class. In the end however the burden generally spreads itself out pretty evenly, because the class that is compelled to assume the heavier burden in the first instance, finds some way to indirectly collect it from others. Canada is a borrowing country, and the one important thing to keep in mind in adopting any system of taxation is to select one that is not distasteful to the lender. Municipal debentures are not in a very favourable position at present and efforts thus far to place our municipal debentures on the trustee list in England have been unavailing. The legal profession can understand and appreciate this and will no doubt use their efforts to guard against a disaster resulting from adopting business methods that are not agreeable to the lender.

No apology is offered for referring to these matters which are away from common every day routine of practice, because the lawyer's field spreads far beyond the boundaries of litigation.

To him the Parliament, the Legislature, the Municipal Council and the School Board, look for guidance. Few legislative reforms, great or small, have come to us but from the lawyer. When trouble arises in the family, in the municipality or in the state, they all instinctively turn to the lawyer. Therefore a heavy responsibility falls upon him and he will undoubtedly have more to do with the above proposals than any other class in the community.

DIVORCE AND BANKRUPTCY.

The outstanding features of this meeting will be Divorce and Bankruptcy. That is you will be asked to consider two conditions of failure, one domestic and the other financial. The lawyer from his calling is brought in contact with these matters more than any other class in the community, and naturally should be better able to suggest remedies. Failure in either of these directions is to be deeply deplored, and if the failure can be made less disastrous by legislation it should be. In the matter of divorce we have already provided a remedy, but unfortunately it is so expensive that to adopt it will in many cases produce the other failure, bankruptcy, thereby inflicting both failures upon the unhappy individual.

THE HAGUE TRIBUNAL.

The growing popularity of the Hague Tribunal is gratifying, not only to the lawyer, but to the world at large. While it benefits the lawyer by providing another tribunal in which he may practice, it also benefits the people as a whole to a greater extent. It is expensive of course, but its expense is infinitesimal as compared with the cost of war. Just as ordinary litigation is expensive, though the cost is trifling as compared with the disaster that followed when people settled their disputes by resort to brute force. The peaceful methods of the lawyer will go on, till the ruffianism of war between two countries will be no more tolerated than the ruffianism of a fight between two individuals upon our streets, when the only war will be between the police soldiers of a united civilization against the barbarous and direlict peoples of the uncivilized portions of the world, and finally the civilized methods of obedience to the rule of law will triumph throughout the world and the lawyers' elysium will be realized.

"When the war drum beats no longer,
When the battle flag is furled
In the Parliament of man,
The Federation of the World."

SOME EARLY LEGISLATION AND LEGISLATORS IN UPPER CANADA.

BY THE HONOURABLE MR. JUSTICE RIDDELL, L.H.D., LL.D.

It is a matter of regret that the early statutes of Upper Canada are not available for the ordinary practitioner; they are full of interest from a historical point of view and otherwise.

Of course, it is well known that at the time of the conquest of Quebec—and consequently of Canada—in 1759 and 1760, what was afterwards Upper Canada, was not settled. Accordingly, the proclamation of 1763 which introduced or purported to introduce the English law, civil and criminal, into Canada, did not practically affect that district. The Quebec Act of 1774, 14 Geo. III., ch. 83, did, however; for, before it was repealed, Upper Canada had a considerable number of inhabitants, chiefly from the revolting colonies to the south. This Act reintroduced the French civil law, although it left the English criminal law in full force. Much discontent was manifested by the English-speaking colonists of Upper Canada at being subjected to French law; and when the Act of 1791, 31 Geo. III., ch. 31, made Upper Canada a separate province, her first Parliament abolished the old Canadian or French law, and introduced the law of England for the decision of all matters of controversy relative to property and civil rights, and also introduced the English rules of evidence. This is found in the very first chapter of the statute of the first session of the first Parliament for Upper Canada.

The second chapter established trial by jury in all actions, real, personal, and mixed, and authorized the jury, if so minded, to bring in a special verdict. In the French system the jury had no place; and the French-Canadian did not hesitate to express his wonder that the English should think their property safer in the determination of tailors and shoemakers than in that of their Judges.

The third chapter established the Winchester measure, "one just beam or balance, one certain weight and measure, and one yard, according to the standard of His Majesty's Exchequer in England." The lineal and superficial measures were the same then as now, but the gallon, etc., somewhat

smaller, being the same as those still used in the United States.

Chapter 6 made a Court for small debts, the ancestor of the present Division Court. It authorized any two or more Justices of the Peace to sit and hold a Court, to be called a Court of Requests, on the first and third Saturday in every month, to try any claim not exceeding 40 shillings, Quebec currency. This was what was also known as Halifax or Provincial currency, a shilling equalled 20 cents. These Courts remained practically unchanged till 1833—their jurisdiction was extended in 1797, by 37 Geo. III., ch. 6, and in 1816 by 56 Geo. III., ch. 5—but in 1833, by 3 Wm. IV., ch. 1, it was provided that Commissioners should be appointed by the Governor or Lieutenant-Governor to sit and hold the Court of Requests. This Act after being amended in 1837 by 7 Wm. IV., was itself repealed in 1841, by 4 & 5 Vict., ch. 3, which provided for Division Courts to be presided over by the Judge of the District Court of the district in which the Division Court was situated. This introduced substantially the present system. We shall have occasion to consider the District Court again.

Chapter 7 regulated the tolls to be taken in flour mills by fixing them at not more than one-twelfth. This has come down unchanged to the present time, R. S. O. (1897), ch. 140, sec. 1.

Chapter 8 provided for a gaol and court-house in every district. Lord Dorchester, the Governor of Canada, had, 27th July, 1788, by proclamation, divided what afterwards became Upper Canada, into four districts, Lunenburg, Mecklenburgh, Nassau and Hesse. The Upper Canada Act, we are now considering, changed the names to Eastern, Midland, Home and Western, and directed that the gaols and court-houses should be placed in New Johnstown (Cornwall), Kingston, Newark (now Niagara), and for the Western district "as near to the present court-house, as conveniently may be."

In 1816, the gaol and court-house for the Home district, was directed to be erected at York (now Toronto), 56 Geo. III., ch. 18.

We shall meet these districts again, and pass over them for the time being.

Chapter 4, abolishing the summary proceedings in the Court of Common Pleas in actions under £10 sterling, and

chapter 5, providing for the appointment of firemen, we also pass over.

The above constitutes the legislation of the first Parliament of Upper Canada during its first session at Newark beginning Monday, September 17th, and ending Monday, October 15th, 1792.

But there were other matters of great interest at this session.

On the 19th September, the Secretary of the Province presented for the consideration of the House, a signed and sealed instrument delivered to him by Philip Dorland, of Adolphustown, in the county of Lennox. This recited a "Certain writ under the great seal of this Province of Upper Canada . . . directed to the returning officer of the county of Prince Edward and district of the township of Adolphustown" requiring him "to send one knight girt with a sword, the most fit and discreet to represent the said county;" also an election by the freeholders, of Philip Dorland; that he, Philip Dorland, being "one of the persons commonly called Quakers," could not take the oath prescribed for members of the House, but he would make a declaration to the same effect. He then asked that if he could not sit without the oath, a new writ might issue. The House ordered a new writ to issue, as Dorland "was incompetent to sit or vote in the House without having taken and subscribed the oath set forth in the Act of Parliament."

On Saturday, September 29th, Mr. Colin McNabb, as preventative officer, was "ordered to attend at the Bar of the House to give information respecting the contrabrand traffic carried on in this district, as far as the same has come within his knowledge."

It is time, now, that we enquire into the personnel of the Legislature. Much of my information as to these I owe to two papers by C. C. James, Esq., M.A., LL.D., C.M.G., contributed to the Royal Society of Canada, in 1902 and 1903, and being vol. 8, sec. 2, pp. 93 *sqq.*, and vol. 9, sec. 2, pp. 145 *sqq.*, respectively.

We may disregard Lord Dorchester, the celebrated Sir Guy Carleton, who was Governor-General of Canada—but Lieutenant-Colonel John Graves Simcoe, the Lieutenant-Governor, is not negligible, for it is certain that he took a personal interest in much of the legislation.

There was a Legislative Council appointed by the Crown for life, and a Legislative Assembly to be periodically elected by the people—the electoral franchise was almost universal suffrage, as the qualification was placed very low—in counties land worth 40 shillings sterling per annum, and in towns the possession of a dwelling house and lot worth £5 per annum, or being resident for 12 months and having paid rent to the amount of £10 sterling.

There was also an Executive Council referred to in an indefinite way in sec. 38 of the Act; the members were appointed by the Crown, and not necessarily members of either House—they held office at will of the Crown. They corresponded more nearly to the cabinet of the President of the United States than to anything now extant in the British world; and were not unlike the Privy Council as it then existed in England.

Of course, the Executive Council formed no part of the Parliament, but there can be no doubt of the accuracy of the following passage to be found in an address to the King by the Legislative Council, April 19th, 1836:—

“For many years the Legislative Council of Upper Canada consisted of but four or five members, connected with the Executive Government by the most confidential relations, and forming in reality a body scarcely distinct from the Executive Council of the Colony.”

A number of legislative councillors, four in all, had been appointed by the Home Government before Simcoe arrived in Canada.

William Osgoode was the first Chief Justice of Upper Canada, and was afterwards, in 1794, appointed Chief Justice of Lower Canada; he was an English barrister of good standing. Osgoode Hall is called after him.

Peter Russell was also appointed in England. He became administrator of the Government in 1795, on Simcoe's resignation; and some scandal was attached to his name, arising from his practice of making grants of Crown lands to himself and his sister, while he was administrator.

Alexander Grant was the only councillor appointed among the first lot who was at the time in Canada. He was commonly known as Commodore Grant. He also became administrator—this was in 1805, on the death of Lieutenant-Governor Hunter.

William Robertson had also been appointed; he had been a resident of Detroit, then and until 1796 part of Canada, but had gone to England in 1790, and never afterwards came to Canada. He resigned shortly afterwards, being in June, 1793, replaced by Æneas Shaw.

There were consequently only three councillors with Simcoe; and as the Act, 31 Geo. III., ch. 31, sec. 3, required at least seven councillors, these were not a majority of the council. Accordingly Simcoe had James (Jacques) Baby appointed—he was in Detroit, and was of a well-known French-Canadian family.

Osgoode and Russell arrived in Canada in June, 1792, and Osgoode, Russell, Grant and Baby were sworn in as members of the Executive Council at Kingston, in July, 1792—writs of summons calling them to the Legislative Council, were on the 16th of that month issued to these four, and also to Richard Duncan, William Robertson, Robert Hamilton, Richard Cartwright, Jr. and John Munro (of Matilda). Hamilton took part in the prosecution of Gourlay in 1819, and was said to have acquired 100,000 acres of Crown lands from the lots granted to sons and daughters of U. E. Loyalists. Cartwright was the ancestor of those of that name familiar in Canadian legal, military and political annals. He was the grandfather of Sir Richard Cartwright, and was even before his appointment to the Legislative Council, a Judge of the Court of Common Pleas (the Court of Common Pleas, we shall meet again). J. S. Cartwright, the present Master in Chambers, and J. R. Cartwright, the Deputy Attorney-General, are also grandsons.

Osgoode was the Speaker of the Legislative Council, being appointed by the Lieutenant-Governor under sec. 12 of the Act; and Messrs. Baby, Hamilton, Cartwright, Munro, Grant and Russell all attended during the session.

A provision in sec. 6 for hereditary rank entitling to a seat in the Legislative Council, never was in fact brought into force.

On Monday, July, 16th, 1792, Simcoe issued a Royal proclamation, dividing Upper Canada into 19 counties: and directing the holding of elections for 16 representatives in the House of Assembly. We are sometimes apt to say that Ontario is divided into counties, and the counties into townships; but historically, in many cases, the townships came first, and the counties were formed by a grouping of townships.

The counties formed by Simcoe's proclamation were: 1, Glengarry; 2, Stormont; 3, Dundas; 4, Grenville; 5, Leeds; 6, Frontenac; 7, Ontario; 8, Addington; 9, Lenox; 10, Prince Edward; 11, Hastings; 12, Northumberland; 13, Durham; 14, York; 15, Lincoln; 16, Norfolk; 17, Suffolk; 18, Essex; and 19, Kent. All these names are still used except Suffolk; but "Ontario" is now applied to a different part of the province: what is now Ontario being in those early times almost wholly destitute of inhabitants—"Ontario County" was then the islands west of the Gananoque river.

Glengarry had two members. For the first riding Hugh Macdonell was returned; for the second, his brother John, who became the Speaker of the first House. As he was a Roman Catholic, he occupied a dignity which he could not at that time occupy in any other part of the British Dominions, except Lower Canada. These two brothers were U. E. Loyalists, and were the maternal uncles of Lt.-Col. John Macdonell, who was Brock's *aide-de-camp*, and was killed with his chief at the Battle of Queenston Heights in the war of 1812. He was also Attorney-General of Upper Canada; a mural plate to his memory is to be found in the east wing of Osgoode Hall.

Stormont was represented by Lieutenant Jeremiah French, a U. E. Loyalist from Vermont.

Dundas sent Alexander Campbell, of whom little is known, or at least recorded.

Grenville sent another U. E. Loyalist, Ephraim Jones, the father of Jonas Jones, afterwards a Judge of the (King's) Queen's Bench; and he had also two sons-in-law, who achieved the same distinction, Levius P. Sherwood and Henry John Boulton.

Leeds and Frontenac were allotted one member; John White, an English barrister, who had been appointed by the Home Government, Attorney-General of Upper Canada, and had come out in June, 1792, was by Simcoe's influence elected member. He was killed in a duel eight years after.

Addington and Ontario sent Joshua Booth, a U. E. Loyalist, who died in the war of 1812.

Lenox, Hastings and Northumberland had one representative—and Lieut Hazelton Shaver, also a U. E. Loyalist, was elected. ("Lenox" was the spelling at that time; now the word is spelled with two n's).

Prince Edward and Adolphustown had one member (for the township of Adolphustown was detached from Lenox for electoral purposes). Philip Dorland was elected, but not taking the oath required by sec. 29 of the Act, 31 Geo. III., ch. 31 (as he was a Quaker) a new writ was issued, and Major Peter Vanalstine was elected in his place—they were both U. E. Loyalists.

Durham, York and first Lincoln sent Nathaniel Pettit, of Grimsby, a member of the Land Board of Nassau District.

The second riding of Lincoln sent Col. Benjamin Pawling, who had been in Butler's Rangers during the Revolutionary war.

The third riding of Lincoln sent Isaac Swayzie, who had been a noted scout on the British side. His enemies called him a "spy."—a mere difference in terminology. He later took a prominent part in the prosecution of Gourlay; and it is said narrowly escaped prosecution for the murder of William Morgan, who had threatened to disclose the secrets of Freemasonry, and who mysteriously disappeared. The mystery has never been cleared up; but it was made evident that Swayzie had nothing to do with Morgan's abduction and death, notwithstanding his boast that he had.* He undoubtedly was a Freemason, however.

The fourth riding of Lincoln and Norfolk together had one representative. Parshall Terry was elected; he was one of Swayzie's bondsmen (v. the note*) and afterwards was drowned in the Don in 1808, having removed to York when Simcoe made the change.

* This is told of him in Dent's "Upper Canada Rebellion," and should be taken *cum grano*: That he had enemies was to be expected, and indeed is fairly certain; there is on record a petition by him, of April, 1790, to the Land Board of Nassau District, "setting forth that from his character having been traduced he had been prevented from enjoying the privileges of other loyal citizens." The Board found that he had produced sufficient proof that his character had been misrepresented; and held that he was entitled to the quantity of land his services entitled him to as a volunteer in the British army at New York.

He was not a member of the second Parliament. When that was in existence, the following misfortune befel him or some other of the same name, unknown to fame, as appears by the Term Books at Osgoode Hall: On Monday, April 20th. 1795, an information for sedition was filed by the Attorney-General, John White, against Isaac Swayzé, and a *capias* was granted to bring him before the Court to answer it. The Court of King's Bench, on that application, was composed of William Dummer Powell, Puisné Justice, and Peter Russell, sitting on Special Commission. On Wednesday, April 22nd, Mr. Swayzé appeared and pleaded "not guilty," giving two sureties, Parshal Terry and Essai Daiton, in £50 each, himself in £100, to appear on Friday next to answer to the information against him. Friday, April 24th, a *venire* was directed to issue

Suffolk and Essex sent Francis Baby, a prominent Canadian of French descent, and like the Macdonells a Roman Catholic.

Kent sent William Macomb and David William Smith,† the former of North of Ireland descent, and the latter, son of the commandant at Detroit.

This first session was held it is said by some—but there seems to be a doubt—in Freemasons' Hall at Newark. The first name of what is now Niagara-on-the-Lake was Niagara, then it was successively called Lennox, Nassau and Newark. As Newark it was the capital of Upper Canada until after the selection of Toronto was made—the name being changed by Simcoe from Toronto to York in honour of the Duke of York, the King's brother. Newark had been selected by reason of the proximity of forts held by the British; Simcoe expected that the British would continue to occupy the forts on the left side of the Niagara River. A guard from the 5th regiment was kept on duty during the whole session—the Lieutenant-Governor had attended in state accompanied by a guard of honour and opened the Parliament by a speech from the Throne in traditional British form—and Upper Canada was fairly launched on her free career.

It was no doubt due to the presence of such lawyers as Chief Justice Osgoode and Attorney-General White in the two Houses, that the legislation is couched in such accurate and efficient language.

WILLIAM RENWICK RIDDELL.

returnable Friday next to try the issue, and Mr. Swayze gave new sureties, John Wilson and Samuel Pew. May 1st, a jury was sworn, whose names are given, and these, on May 2nd, "by their foreman, Andrew Templeton, find the defendant guilty." He then found sureties, William Reid and John Hainer, to appear for judgment the first day of Trinity Term, July 20th. On that day he entered into a recognizance himself in £200 P.M. (i.e., provincial money), and George Forsyth and Joseph Edwards in £100 each, to appear Friday, July 24th. There the Court sentenced him to pay a fine of £10 P.M. and stand committed until it should be paid, and also to enter into a recognizance with two sureties for his good behaviour for two years.

He afterwards was elected for the third, fourth, sixth and seventh Parliaments, dying in 1828.

The name is spelled "Swayzie," "Swayze," "Swayzē," "Suayze" and "Swayzy" in different places.

† David William Smith, Deputy Judge Advocate, of Newark, received a license dated at Navy Hall, July 7th, 1796, under the hand and seal-at-arms of Governor Simcoe, countersigned by W. Mayne, Acting Secretary, authorizing him to be and appear as an advocate or attorney in all and every of His Majesty's Courts. He afterwards removed to England, became a Baronet in 1821, and died in England, 1837, at the age of 73.

HIGH COURT OF JUSTICE, ONTARIO.

JUDGMENT OF HON. MR. JUSTICE BRITTON.

JANUARY 9TH, 1913.

LINDSEY v. LE SUEUR.

Trial at Toronto without a jury.

Hellmuth, K.C., and *Moorhouse*, for the plaintiff.

Shepley, K.C., and *Hill* (Ottawa), for the defendant.

BRITTON, J.:—This action is to compel delivery by the defendant to the plaintiff, of certain documents and extracts and copies of documents which the defendant now has, and which he obtained from the collection of the late William Lyon Mackenzie, and for an injunction restraining the defendant from publishing or making public any of these documents or copies of or extracts from them.

The late Charles Lindsey was the son-in-law of the late William Lyon Mackenzie.

The plaintiff, George G. S. Lindsey, is the son and sole executor of Charles Lindsey.

Charles Lindsey was the owner of a large and valuable collection of books, papers, manuscripts, letters, etc., which had been the property of William Lyon Mackenzie. Prior to February, 1906, the publishing firm of Morang & Company had determined to have written for publication and sale, books on "The Makers of Canada."

To carry out this purpose Morang & Co. chose to include William Lyon Mackenzie in the series, and they employed the defendant to write that book.

In February, 1906, Charles Lindsey resided with the plaintiff, and at that time the defendant sought and obtained an introduction to the plaintiff, and requested to be allowed access to the Mackenzie collection. It is alleged that the defendant represented to the plaintiff that he, the defendant had undertaken to write the life of Mackenzie for the Morang & Company series; that the life so written would be to the satisfaction of Morang & Company; and that it would be published in the series mentioned.

It is further alleged that the defendant represented that the work would be entered upon by him in sympathy with the character he was to depict, exhibiting in the book Mackenzie as one of "The Makers of Canada." Upon this representation, the plaintiff, acting for his father, allowed the de-

fendant free access to the collection to make copies of and extracts from documents, and, generally, to obtain such information as was available.

The defendant for months resided in the plaintiff's house, and while there, obtained the information sought.

The defendant completed his manuscript, sent it to Morang & Company, and it was rejected.

The plaintiff says that by necessary implication from what took place, the agreement was that the defendant, in writing such life of Mackenzie, as one of the class mentioned, would make fair use of the material he found. The plaintiff charges that the defendant did not do so, and for that reason the life written by defendant was partizan and unfair; and in consequence thereof, the manuscript was rejected.

I have spent a great deal of time in reading with care most of the evidence, given at great length upon the trial of this action. No useful purpose will be served by my referring at length or quoting from the evidence.

It seems to me clear, that the plaintiff, and the late Charles Lindsey supposed that the defendant intended to write of William Lyon Mackenzie as one of the men in Canadian history, who can fairly be called, speaking colloquially, one of the "Makers of Canada." The conduct of the defendant and what he said, warranted the plaintiff and Charles Lindsey in so thinking. I must find as a fact, that the defendant gave the plaintiff and Charles Lindsey to understand that the views and feelings of the defendant towards Mackenzie were friendly, that his attitude in presenting Mackenzie to the public was a fair one, that he had no bias against Mackenzie, and that he had no feeling or opinion which would prevent him, as a writer, from truly presenting the facts and circumstances of Mackenzie's life and character. The defendant in my opinion, intended that the plaintiff and Charles Lindsey should believe as they did in reference to defendant's feeling and attitude.

At the time of defendant's arrangement with the plaintiff, the defendant did hold strong views against Mackenzie. At that time the defendant intended to write the life of Mackenzie on other than "conventional lines." He intended to write of Mackenzie, not as one of the makers of Canada in the general acceptance of that term, but as a "puller down," as was stated during the trial.

I deal with this matter simply as a matter of contract and good faith between the parties, not expressing any opinion as to whether the defendant is right or wrong in his estimate of Mackenzie. It does not, so far as it affects this case, except as a matter of good faith on the part of the defendant, make any difference whether Mackenzie was a man of high aims and unselfish purposes, contending against real wrongs permitted by bad laws and perpetrated by unjust administration; or a mere adventurer, willing to point where he would not lead, a mere inciter to rebellion against the laws that were just, and administered by men able and honest.

I quite recognize that the biographer should write truly of his subject. He should not, as defendant said he would not write any fairy tale or Jack the Giant Killer story. The defendant could write truly of the life selected, and draw such inferences as might please him, from the facts, and any quarrel with his inferences would be in the nature of fair discussion. But this is a question of how the defendant came to get possession of what is now the plaintiff's property, and of the use he made of it as distinguished from the use the plaintiff supposed the defendant would make of it, and as distinguished from the use the defendant led the plaintiff to think would be made of it, and as to the use the defendant now proposes to make of it.

If the defendant obtained possession of, or access to, property now belonging to the plaintiff, by misrepresentation, or by concealment of facts he was bound to disclose, then he must not further use that property.

I am of opinion, upon the evidence, that the defendant made use of the Mackenzie collection of books and papers other than was in accord with the understanding between him and the plaintiff and Charles Lindsey.

The use made was contrary to the wish, and contrary to what was known to be the wish of the plaintiff, and contrary to the wish of the plaintiff's father. It is inconceivable upon the facts that either Charles Lindsey or the plaintiff would have permitted access to the Mackenzie papers had either known or supposed that such manuscript as the defendant produced would have resulted. It is plain to me that the defendant knew that he could not have obtained access to the collection had he revealed his true feelings, or declared his real intention.

No question of copyright is involved. It is a question of getting access to the house of another and using the property therein for personal purposes different from what was consented to by the owner.

It has been held that to permit publication of musical compositions in volume form "did not amount to a permit to publish one by one, in a serial form."

In re Jude's Musical Compositions, L. R., 1907, 1 Chy. D. 651.

It is not the right of a party to an action, who has obtained access to the papers of his opponent for use in the action, to make the papers public.

Just before defendant's arrangement with Morang & Company, the life of William Lyon Mackenzie had been written by Mr. Hughes for the series mentioned.

The criticism by the defendant upon the work of Mr. Hughes was severe. It was in part, at least, instrumental in having the work rejected by Morang & Company. The defendant, I think, intended that rejection should result.

The language used in correction was such as to evince irritation on the part of defendant at times when words of praise or commendation of William Lyon Mackenzie were used. The defendant concealed from Charles Lindsey and from the plaintiff, the fact of his criticism of the work of Mr. Hughes

Whether the criticism was just or not—and assuming that the defendant thought it just—he should have informed Charles Lindsey or the plaintiff of it. The plaintiff is entitled, in his own right, to maintain this action. He is, as I have more than once stated, now the absolute owner of the Mackenzie collection, and is seeking to protect it from its unauthorized use by the defendant.

The plaintiff is not suing for, and is not entitled to recover damages, if any, that accrued to Charles Lindsey in his lifetime. It is open to the plaintiff to say, if according to the facts, that the defendant improperly obtained access to the collection; that, when access obtained, the defendant made an unfair use of the privilege, and that the purpose for which he obtained access having been served, the defendant is not entitled to further deal with the extracts and copies made. It is not a question of damage to Charles Lindsey, or of the survival of any right of action he had.

Charles Lindsey did not so deal with this collection, by contract, or consent or otherwise as to prevent plaintiff now asserting his right to guard it. Charles Lindsey permitted the defendant to use the collection to assist defendant in writing a book to be published by Morang & Company. That book has not been published by them, and will not be. All negotiations between the defendant and that firm are at an end. The defendant has no right, as against the plaintiff, to have a book, the one written, or another book, using the extracts or copies from plaintiff's collection, published elsewhere. The statement of defence mentions the action of defendant against Morang & Company, reported in appeal, 20 O. L. R. 594, and states in substance, that the plaintiff took part in that for Morang & Company. In that action very likely evidence was given, the same in part as was produced by the plaintiff on the trial of this action. No doubt the plaintiff herein sympathized with Morang & Company, and possibly assisted in the defence. That is not material. The plaintiff was not a party to that action. There is no estoppel.

The plaintiff, before action, demanded from the defendant, a return of the extracts and copies, and an assurance that he would not publish them or make use of information derived from the collection. The defendant refused to deliver up the extracts and copies, and expressed his intention of publishing them in book form. In fact, the defendant by counterclaim, alleges that shortly before the commencement of this action, he was entering into arrangements for the publication of his book, and claims damages because of plaintiff's interference. As to the "information" said to have been obtained by defendant from the collection, it will be difficult, if not impossible for even the defendant at this stage to say just what particular fact was learned there instead of from the book of Charles Lindsey or some other writer, or elsewhere.

1. The plaintiff is entitled to an order requiring the defendant to deliver up to the plaintiff all of the extracts from and copies of any documents in the William Lyon Mackenzie collection mentioned in the statement of claim.

2. An order restraining the defendant, his servants and agents, from publishing or causing to be published any book which contains any of said extracts or copies, or that contains information avowedly obtained from the Mackenzie collection.

The plaintiff has not sustained any substantial pecuniary damages, but a legal injury will be done if the collection, without his consent is interfered with, and he is entitled at least to nominal damages, say \$5. The judgment will be with costs, payable by the defendant to the plaintiff. The counter-claim will be dismissed with costs. If any difficulty is found as to form of judgment I may be spoken to on settling the minutes.

Thirty days' stay.

THE ADVISABILITY OF ESTABLISHING A BANKRUPTCY COURT IN CANADA.

In the development of Canadian commerce transcontinental systems of railway transportation have been found necessary. Similarly under the operation of the banking laws, large banks have been created with their head offices in the monetary centres, and branches spread over the entire Dominion. For the administration of the affairs of insolvent trading corporations, including banks and insurance companies, a Winding Up Act, national in its scope and effect, has been in force for many years. For the administration of maritime laws and the laws relating to patents, trade-marks and copyrights jurisdiction has been conferred upon the Exchequer Court, which is likewise a transcontinental institution.

I have mentioned these transcontinental institutions at the outset for the purpose of suggesting that Canada is now, or is fast becoming a nation, and that the commercial activities of its subjects should not in any way be limited by provincial boundaries. If all the laws respecting commercial matters in Canada were made uniform it would scarcely be denied that the various Legislatures were doing good service to the commercial community. If it be true that uniform commercial laws would be in the interest of Canadian commerce, then it is also true that those laws which relate to insolvency should be uniform throughout the Dominion. Indeed this is the principle which was adopted at Confederation, for under sec. 91, of the British North America Act, exclusive jurisdiction is given to the Dominion Parliament to make laws respecting bankruptcy and insolvency.

It may be well to say a word as to the power of the Dominion Parliament to erect a Bankruptcy Court. Under sec. 101, of the British North America Act, the Parliament of Canada is given power to provide for the establishment of additional Courts for the better administration of the laws of Canada. It has been well settled that under the jurisdiction to enact laws relating to bankruptcy and insolvency, the Dominion Parliament has the power to interfere, not only with property and civil rights (which are exclusively within provincial jurisdiction), but also with procedure within the provinces (a subject also exclusively provincial), so far as a general law relating to bankruptcy and insolvency may affect those particular subjects. It is, therefore clear that the Parliament of Canada has the power to constitute a Court of Bankruptcy having jurisdiction over the entire Dominion.

I have been asked to discuss within the limits of a short paper, the advisability of establishing such a Bankruptcy Court.

All countries have, and in all ages, have had the problem of insolvency ever before them, and they have from time to time endeavoured to apply two principles for its solution. One principle is that upon insolvency all the property of a debtor not exempt from execution belongs to the creditors and should be distributed ratably among them. The other principle, which is correlative to the first is that if the debtor surrenders all his property—if he makes a complete *cessio bonorum*—and has been honest in his dealings, and is not incompetent, he should be given a discharge from all his existing liabilities. These two principles constitute the essential elements of bankruptcy legislation.

The first principle has been adopted by the various provincial Legislatures, and their legislation upon the subject has been held to be within their constitutional powers.

The second principle—that of compulsory discharge—is not within the power of the provinces to adopt. *The Attorney-General of Ontario v. The Attorney-General for the Dominion of Canada*, 1894, A. C. 189. Certain approximations to this second principle the provinces have, however, adopted. They have adopted the principle that an honest, but unfortunate debtor is not to be kept in prison because of his inability to pay his debts. Some of the provinces have also by the passing of exemption laws and Statutes of Limitation, endeavoured to prevent a debtor from being forever

weighted down with an impossible load of debt. The relief granted by these last-mentioned laws has not, however, been conditional upon the honesty of the debtor. So far as enforcing the principles of commercial morality is concerned these laws are necessarily indiscriminate in their operation. They have equal application to the just and to the unjust; to the rash speculator and to the unfortunate tradesman; to the man who has become insolvent because of the failure of his debtors or perhaps through financial panic and depression, and to the spendthrift and gambler who has wasted his substance in riotous living; to the confidence man to whom a straight path is impossible, and to his unfortunate dupes.

HISTORY OF BANKRUPTCY LAWS.

The principle embodied in the want of bankruptcy legislation in Canada is, historically considered, that of slavery. In the most primitive stage of society, indeed, the remedy, if there was any, was probably that of private vengeance. In the next stage we have the condition of things which may be described as private vengeance regulated by the State—the *manus injectio* of the Romans, whereby the creditor was permitted privately to imprison the debtor, and even to kill him. In the next stage we have public imprisonment of the debtor. The debtor was restrained of his liberty, that is, he was restrained as to locality and also as to his liberty to deal with his fellowmen. Later still, in the next stage, the restraint as to locality was removed, but the restraint as to the debtor's dealings with others was, in effect, retained. Imprisonment for debt is abolished, but, no discharge being granted, the disability as to dealing with others persists. In the last and final stage of development personal restraint entirely disappears, and the honest, but unfortunate debtor is not only not imprisoned, but is left free to engage, unhindered, in the activities for which he may have any special skill and aptitude to the benefit of himself, his family, and of the State.

A glance at the pages of history is sufficient to verify the evolutionary process here briefly sketched. In all primitive communities of which we have historical record, the rule was that a man must pay his debts in full, and if he could not pay with his property, he should answer with the liberty, not only of himself, but of his family. The Old Testament contains the story of a woman, who sought the help of Elisha,

saying, "thy servant my husband is dead and the creditor is come to take unto him my two children to be bondmen." 2 Kings 4, 1.

Sir Henry Maine said: "Nothing strikes the scholar and jurist more than the severity of ancient systems of law towards the debtor and the extravagant power lodged in the creditor." It brought many early States to the brink of ruin. In Athens a revolution was only averted by the abolition of enslavement for debt. In Rome in the ancient law of the twelve tables every execution was personal and resulted in the bondage of the debtor, and a right to the creditor to sell him into slavery or even to kill him. If several creditors had claims upon one and the same debtor the law allowed them to cut the debtor into pieces and divide his body between them. The creditor's right to sell his debtor was abolished in 313 B.C., nevertheless, imprisonment continued to be the principal method of execution. When the person of the debtor passed into the power of the creditor, the same fate befell his whole estate. It was not until the time of Julius Cæsar that a debtor became entitled to immunity from imprisonment on formally giving up everything to his creditors, *cessio bonorum*. This *cessio bonorum* marks the commencement of one of the true principles of bankruptcy.

The earliest English statute on the subject of bankruptcy was passed in 1542. Then, as now, it was found necessary to enact laws for protection against fraudulent traders. The next Act was passed in 1570, and applied only to traders, but provided penalties for the non-disclosure of assets. Neither of these Acts granted any relief to the debtor in the way of discharge of liability, and although the law expressed in those Acts, was modified by new statutes from time to time, it was not until 1706 that the principle of granting a discharge to the debtor was introduced. The Act of 1706 provided that the debtor might with the consent of a specified majority of his creditors obtain from the commissioners who had the conduct of the bankruptcy proceedings a certificate which when confirmed by the Lord Chancellor discharged his person and whatever property he might subsequently acquire from all debts which he owed at the time of his bankruptcy. Until 1831 the jurisdiction over bankrupt estates was exercised either directly by the Lord Chancellor or by Commissioners appointed by him. In that year a Bankruptcy Court was established in England, and continued until the juris-

diction was in 1883 transferred to the High Court and certain County Courts.

In Scotland where a most simple and practical system of bankruptcy is now in operation, all insolvents were at one time called *dyvours*, and were regarded as fraudulent debtors. In the beginning of the seventeenth century, the unfortunate *dyvour* was clad in party colored garment, one-half yellow and the other brown, and in this attire was exposed at intervals upon the public pillory. Although this practice long ago fell into disuse, it was not abolished by law until 1836.

When the laws of England were introduced into Upper Canada in 1792, the laws respecting bankrupts were excepted, the statute, 32 George III., ch. 1, sec. 6, enacting: "Provided always and be it enacted by the authority aforesaid, that nothing in this Act contained shall introduce any of the laws of England respecting bankrupts." After the union of Upper and Lower Canada, and in 1843, a Bankruptcy Act was enacted which granted a discharge to the debtor from all debts due by him at the date of the commission and from all claims provable under the commission. This Act by its terms to continue in force for only two years, but by subsequent enactments passed annually it was continued in force until 1849. The Act applied only to traders and the term "trader" was very strictly defined. In 1844, an Act for the relief of non-traders was passed, by which such persons were protected from arrest under civil process. In 1864 a new Insolvent Act was passed which applied in Lower Canada to traders only, but in Upper Canada to all persons. This Act was repealed in 1869, and the Insolvent Act of 1869, which applied to traders only was substituted. The Act of 1869 was by its terms limited to four years, but in 1874, it was continued until the following year, and in 1875, a permanent Act was passed applicable to traders only, and this Act was repealed on the 1st of April, 1880.

In New Brunswick prior to Confederation there was no bankrupt or insolvency law, nor any provision for the distribution of a person's estate other than by ordinary process, and there was no law against preferences.

In Nova Scotia a remedial law intended to supplement and mitigate the law of imprisonment for debt was in force before Confederation and in British Columbia and Vancouver Island, the English bankruptcy law of 1849, was in force until those provinces became part of the Dominion.

PRESENT LAWS.

In Ontario and the Western Provinces, very strict laws are now in force prohibiting unjust preferences of one creditor over another. There are also laws abolishing priority between execution creditors. Assignments for the benefit of creditors providing for a ratable distribution of an insolvent debtor's property among his creditors without preference or priority (except claims given by law or statute, a preference such as wages), are valid, and for certain purposes the assignee is the representative of the creditors. These Acts also contain provisions for the examination of the debtor and for the contestation of creditors' claims. Under these Acts the assignee is in the first place selected by the debtor, but may be removed and a new assignee appointed upon a vote of the creditors. The creditors are largely at the mercy of the assignee, both as to the administration of the estate, the expenses connected therewith, the scrutiny of claims, the conduct of proceedings for the contestation of securities and the examination of the debtor. In many cases no doubt the creditors prefer to avoid the loss of time and expense which would be involved in scrutinizing the affairs of the estate and are content to take whatever dividend may become payable and to continue to hold their debtor responsible for the unpaid balance of their claims. Unless a creditor wishes to be unduly harsh, he omits to obtain judgment for the amount remaining due to him and consequently in due time his claim is barred by the Statutes of Limitation and the debtor becomes free from enforceable liability except to those creditors who have taken the precaution to obtain a judgment against him.

BANKRUPTCY IN OTHER COUNTRIES.

Apart from China and Canada, and possibly Japan, there is no country of any considerable importance without its bankruptcy law. In China the various foreign nationalities have bankruptcy laws, which are enforced against their nationals. All Chinese delinquents pass into the dishonoured class, and are put under process of coercive termination of a business career, and are subject to punishment by bamboo blows.

In the United States the first bankruptcy law was passed in 1800, and repealed in 1803. A second Act was passed

in 1841, and repealed in March, 1843. A third was passed in 1867, and repealed in 1878. In 1898, Congress passed a Bankruptcy Act, which is now in force in the United States

THE CAUSES OF FAILURE OF BANKRUPTCY LAWS.

It will be seen by reference to the many Bankruptcy Acts which have been passed both in England, the United States, and in Canada, that bankruptcy legislation has apparently been a series of experiments. This has been due to various causes. The principle of every Bankruptcy Act, since the beginning of the 18th Century, has been the same. The difficulty has been in its administration. Some of these difficulties are:—

1. The manufacture of fraudulent claims.
2. The rapacity of trustees.
3. The expense attendant upon the administration of an estate under the official supervision of a Court.
4. The absence of control by creditors.
5. The facility of obtaining the approval of a deed of composition by creditors constituting the requisite majority.
6. The absence of public examination of the debtor.
7. The want of sufficient penalties for dishonest or reckless conduct or for violations of the principles of commercial morality.

CAUSES OF THE REPEAL OF BANKRUPTCY LEGISLATION IN CANADA.

The repeal by Parliament in 1880, of the Insolvent Act, of 1875, was probably due to an aggregation of evils rather than to any specific cause. Under the Act of 1875, there was no single Bankruptcy Court. The Act was administered in Quebec by the Superior Courts, in Manitoba, by the Court of Queen's Bench, in Ontario, British Columbia, and Prince Edward Island by the County Courts, and in Nova Scotia by the Court of Probate, until such time as County Courts should be established in that province. There was no examination of the debtor in open Court. True, a debtor was liable to be examined under oath before the assignee, and was bound to attest his statements of liabilities and assets under oath. The administration of the estates was committed to a privileged class of persons called official assignees, who were appointees under the party system of Government.

No effective audit of the accounts of these assignees was provided for and the security required to be given by them for the proper administration of estates committed to their care was nominal. The debtor by obtaining the execution by a majority in number and three-fourths in value of his creditors having proved claims of \$100, and upwards, could obtain his discharge unless some dissenting creditor chose to intervene and oppose confirmation of the composition upon grounds enumerated in the statutes. Moreover, at the time that the Canadian Parliament dealt with the matter in Canada, an agitation was on foot in England to repeal the bankruptcy law of that country. As the dissatisfaction existing in England with the working of the bankruptcy law then in force contributed in no small degree to the repeal of the Canadian Act—helping as it did to discourage the supporters of bankruptcy legislation here and to confirm the opponents of it in their antagonism—we may digress for a moment to glance at some of the defects in the English Act, which gave rise to the aforesaid dissatisfaction and agitation.

In most respects the English Act, of 1869, was an admirable one, but the English practitioner discovered in it what in the slang of the present period may be called a "joker."

Sections 125 and 126 of the Act contained provisions enabling a debtor to present a petition in Court for liquidation of his affairs by arrangement or on payment of a composition. On presentation of this petition a meeting of creditors was to be summoned, but the names of the creditors were furnished by the debtor himself. No judicial investigation of the right of these creditors to be deemed creditors was held. A majority in number and value after lodging proof of claims could, by resolution, agree to liquidation by arrangement, and to the acceptance of the composition. That resolution then became binding on all other creditors, without any act of approval by the Court, any judicial examination of the debtor, or any judicial examination of the trustees' accounts. The consequence was that most of the proceedings under that Act were taken under these sections. After the Act had been in force ten years the comptroller in bankruptcy reported 13,000 annual failures in England and Wales, and of these 12,000 were taken under secs 125 and 126. The facilities for fraudulent and collusive arrangements afforded by the Act, and the want of effective control over the administra-

tion tended to lower the moral of the proceedings and to throw the control of them into the hands of the less scrupulous members of the profession. The demands for reform were frequent and came from all classes of the business community. Thirteen Bills, dealing with the subject were introduced into the English House of Commons between 1869 and 1879. At length in 1879 a memorial signed by a large body of bankers and merchants in the city of London, a memorial described as "One of the most influential memorials ever presented to any Government," was forwarded to the Prime Minister. The matter was referred to the president of the Board of Trade, who was Mr. Joseph Chamberlain. Exhaustive inquiries were made under his direction, and in 1881, a measure was introduced which with some amendments finally became law, under the title of "The Bankruptcy Act of 1883." This Act with some amendments is still in force in England, and is giving satisfaction. One underlying principle of the Act is—the estate for the creditors, not for the debtor or for the trustee. The other underlying principle is—commercial morality. The dealings of an insolvent debtor with his estate are not matters which concern only him and his creditors; the community is also vitally interested therein. Therefore, the Act, while just and generous to the honest and unfortunate trader, penalizes the incompetent and dishonest and endeavours to protect the trading community from his incompetency and dishonesty.

DEBATES OF 1879 AND 1880.

The agitation for the repeal of the English Bankruptcy Act of 1869, synchronized then, as we have said, with the debates in the Canadian House of Commons on the same subject in 1879 and 1880.

In 1879 a resolution was proposed by the leader of the Government to refer three bills, which had been introduced in that session, dealing with the question of insolvency legislation, to a select committee, whose duty it should be to enquire into and consider all questions of insolvency and bankruptcy. On the debate on this resolution many speakers on both sides of the House strongly opposed the continuance of bankruptcy legislation, but the resolution to refer was nevertheless passed and the committee was appointed. Later in the same session they brought in their report and proposed the repeal of the old law and the enactment of a new Act.

An amendment was moved to approve the report of the committee in so far as it related to the repeal of the old Act, but not to enact any new law. Somewhat unexpectedly this amendment received an affirmative vote in the House, but was rejected in the Senate. Next year, however, a bill to repeal the existing Act was again passed in the House, and this time it received the support of a majority in the Senate, and the Insolvent Act of 1875, was repealed.

Thenceforward creditors were compelled to protect themselves against one another by means of the more or less imperfect remedies provided by provincial enactments. Debtors had several courses open to them:—

1. They could leave the country.
2. They could carry on business in the names of their wives and defy their creditors.
3. They could form limited liability companies.
4. They could obtain precarious credit.
5. They could await the Statute of Limitations.
6. They could obtain a discharge from such of their creditors as were willing to grant it and could settle with or pay the others.

The honest capable man, unwilling to adopt any device derogatory to his manhood was practically prohibited from giving to the community the benefit of his services, except as the hired servant of others more fortunate, but possibly not so capable as himself.

OBJECTIONS URGED IN PARLIAMENT.

When the debates in Parliament are examined it will be found that the reasons given for the repeal did not go to the root of the matter. The fault of the law was not so much in its principle as in its administration.

Among the objections were:—

1. The Act gives too great a facility to debtors to make private arrangements with their creditors.
2. The throwing of bankrupt stocks on the markets deranges business and militates against the honest trader.
3. The only man who needs protection is the honest but unfortunate debtor, and to such a debtor the commercial community will be indulgent without a bankruptcy law.
4. A bankruptcy law, the benefits of which are enjoyed only by traders, induces a great many people to go into business who otherwise would not.

5. Bankruptcy laws encourage rash speculation and induce a great many improvident persons to go into speculation into which they would not venture if they did not know that they had a chance of getting a discharge from their liabilities if they should be unsuccessful.

6. The Act is too expensive in its operation. In most cases creditors are pleased to enter into deeds of composition in order to get anything at all.

7. The assignees and lawyers are too rapacious and it is to their interest to prolong the proceedings and increase the expense. Under the old system one man, namely the man with the first execution in the sheriff's hands, got his pay. No one gets it now. Nobody gets paid. They had raised up a class of official assignees who took it all.

8. Confining the operation of a bankruptcy law to traders is class legislation. The Act is detrimental to farmers and other classes of society who are shut out from the privileges of the Act. A trader got a non-trader to endorse his note, and after a while got into difficulties. He could call his creditors together and could get relief from his creditors, but the non-trader who had endorsed his paper must pay up to the last farthing and might be ruined thereby.

9. One reason for the unpopularity of the Act was the absence of proper supervision of the assignees. Were there Government inspectors to supervise all the acts of the assignees things might be otherwise. Many official assignees manage by some means to find out the affairs of persons in business and facilitate their bankruptcy.

10. Another reason for the unpopularity of the Act in Ontario was the permission to creditors to name an assignee outside the province, while there was no power to bring one who had acted improperly to the province to make him disgorge.

11. At a meeting of creditors one or two of those who held the heaviest claims were appointed inspectors, and they took good care of their own interests. They come to an understanding among themselves whilst the less fortunate suffer. The law did not protect those who did work for the merchants—the mechanic, the working man, the professional man, all those who work.

RURAL OPPOSITION.

It will be seen from these suggestions urged in the House of Commons debate at the time, that one of the powerful causes operating to bring about the repeal of the Act was the fact that only traders were entitled to its benefits. These objections were urged more especially by members representing rural constituencies. Repeatedly it was pointed out by such members that the majority of their constituents, farmers, mechanics, and professional men, received no benefit from the Act, though compelled to bear their share of the loss resultant.

Other causes more or less unconnected with the merits of the Act itself that conduced in no small degree to its repeal were:

PREDOMINANCE OF QUEBEC.

The fact that in Lower Canada they had a provincial law which enabled a creditor to hold an insolvent's property for the benefit of all creditors. It was pointed out that clause 766 of the Code of Civil Procedure provided a much more simple, much more expeditious, and much less unjust remedy, and that the inhabitants of Quebec had the great advantage of protecting the unfortunate debtors from the bite or embrace of the official assignee. The strongest opposition came from the province of Quebec.

IS A BANKRUPTCY LAW VICIOUS?

The Commons were also influenced, as has been already mentioned, by the fact that in England they had not as yet succeeded in devising a satisfactory bankruptcy procedure. The same thing was at this time also true of the United States. There was in fact much dissatisfaction in both these countries with their existing laws. It was strongly urged that this dissatisfaction proved the contention that all bankruptcy laws were inherently vicious and incapable of successful enforcement, and that it was no use trying to amend them.

Many of the complaints were well-founded. Parliament, however, overlooked the fact that no real argument against the principle of bankruptcy laws had been brought forward. The objections, formidable as they were, were not to the substantive but to the adjective portions of the law. The

principle of the bankruptcy law was correct. The method of the administration and enforcement thereof was defective. All that was needed was the man to find the remedy. The man was found. He was the long-sighted, clear-headed, and capable Joseph Chamberlain, then occupying the position in the English Cabinet of President of the Board of Trade. After exhaustive enquiries he found the remedy, and for nearly thirty years the Act introduced by him, and which became law in 1883, has been administered in England in such a way as to secure bankrupts' estates for the creditors and justice, not slavery, for honest debtors. Similarly in the United States, after various experiments, Congress upon a careful and exhaustive inquiry into the operation and effect of bankruptcy laws in other countries, enacted a national bankruptcy law in 1898, which, with some amendments made in 1903, has been the law ever since and gives every evidence of being entirely satisfactory to the nation at large.

COMPARISON OF FAILURES IN CANADA WITH THOSE IN ENGLAND AND IN THE UNITED STATES.

That a bankruptcy law does not tend to increase the number of failures is apparent from a comparison between the number of failures in Canada in the past four years as against the number of failures in the United States and England.

CANADA.

Year	Number of Failures	Assets	Liabilities	One failure for every
1908	1,713	\$7,767,207	\$17,577,201	3,885
1909	1,581	6,156,915	12,724,384	4,325
1910	1,459	6,961,147	15,525,134	4,810
1911	1,399	6,399,647	12,799,001	5,000
Average				4,500

UNITED STATES.

1908	15,690	.....	\$222,315,684	5,655
1909	12,924	.....	154,603,465	6,995
1910	12,652	.....	201,757,097	7,270
1911	13,241	.....	186,498,823	7,060
Average				6,745

ENGLAND AND WALES.

Year	Number of Failures	Assets	Liabilities	One failure for every
1907	4,111	£1,917,338	£5,673,623	8,916
1908	4,306	2,103,492	5,509,949	8,040
1909	4,070	2,154,034	5,804,142	8,700
1910	3,880	2,867,068	8,211,678	9,200
Average				8,714

These figures for England and Wales represent the numbers of receiving orders made under the Bankruptcy Act, and do not include cases of insolvency under deeds of arrangement. The exact figures for these latter are not available but the indications are that if they were included the number of inhabitants to a failure would still be over 5,000. It would appear, therefore, from the foregoing that there are as many or more failures in a country without a bankruptcy law as in analogous countries possessing such an enactment.

ENGLISH ACT OF 1883.

The salient features of the English Bankrupt Act of 1883, may be said to be as follows:—

1. An independent and public investigation of the debtor's conduct.
2. The punishment of commercial misconduct and fraud in the interests of public morality.
3. The summary and inexpensive administration of small estates.
4. Full control by a majority in value of the creditors of the appointment of a trustee and a committee of investigation.
5. Strict investigation of the proofs of debt with regulations as to the proxies and votes of creditors.
6. Provision that no arrangements between creditors and debtors, or compositions by deed or by resolution, should have any force against dissenting creditors, unless confirmed, after full investigation by the Bankruptcy Court.
7. An independent audit and general supervision of the proceedings and control of the funds in all cases.

In 1908, after the law had been in force for 25 years, a committee of the Board of Trade, after making full enquiry into the working of the English Act, and into those of

Germany, France, Australia, Scotland and Ireland, reported that the result of their enquiry did not disclose any dissatisfaction on the part of the commercial community with the main features of the then existing law and procedure. Improvements were suggested in certain minor aspects of the law and certain branches of its administration, but with regard to the general scheme they recommended no change.

It has already been pointed out that other parties are interested in insolvency than the creditors and the debtor.

Unless restrained by legal enactment, the predominant characteristic of the human mind is selfishness. Every man is more or less dominated by what is best for his own interests. It matters little to creditors that it is unsafe to the community that their debtor should be allowed to carry on his trade. On the other hand it also matters little to creditors that their debtor has talents and enterprise, which if allowed free scope, would be of great value to the community. In the one case, if he is willing to offer them five or ten cents more on the dollar than they can collect from his estate, they will give him a discharge, and allow him to prey generally upon the community, until he again fails, and pays only a percentage of his debts. In the other case, unless the debtor's friends are willing to come to his aid, and recognizing his talents and enterprise, are willing to contribute out of their own means towards his debts, they are willing that he shall be handicapped with such a load of debt as to deprive the community of his services. His only reliefs are the Statute of Limitation, the generosity of such of his creditors as recognise both his honesty and ability, and thirdly, the satisfaction of the demands of those sordid individuals, who refuse to give a man a chance until they have first extorted the uttermost farthing. The trading community does not sufficiently recognize that the dishonest trader is a menace to the community, nor that it is impossible for the honest man who pays one hundred cents on the dollar to compete with the man who frequently fails and pays only a percentage of his debts. Many men are reputed to have become rich by so administering their affairs as to fail for a sufficiently large amount.

PROPOSED REMEDIES.

It would be beyond the scope of this paper to attempt to work out the details of a Canadian bankruptcy law. The

English and American Bankruptcy Acts contain sufficiently ample measuring rods to enable a satisfactory Act to be framed.

The particular points to be observed are:—

1. Every debtor must be compelled to submit to a public examination before a judicial tribunal respecting his conduct, and he must be compelled to explain the reasonable and probable causes of his failure in business.

2. No man whose failure has not been brought about by misfortune should be entitled to a discharge.

3. All undischarged bankrupts should be incapable of obtaining credit and should be incapable of holding public office and positions of trust.

I would, therefore, suggest:—

1. That there should be enacted in Canada a uniform law, governing all matters coming within the ambit of bankruptcy legislation. Creditors in Toronto or Montreal should be able to know that the remedies against a defaulting debtor resident in Halifax are equally as good and as readily available as the remedies against a debtor in Vancouver.

2. The administration of the bankruptcy laws should be committed to the Superior Courts of the various provinces, and the Judges of the various County and other local Courts should be Referees in bankruptcy.

3. Upon the commission of an Act of bankruptcy the creditors should have a summary and speedy remedy against the entire estate of a debtor.

4. The creditors should have the entire control of the administration of assets and should be at liberty to say whether the assets should be administered under the supervision of the Courts or by a trustee of their own choosing.

5. No composition should be effective or should entitle the debtor to a discharge unless first confirmed by the Court after full enquiry into: (a) the conduct of the debtor; (b) the claims of the creditors; (c) the objections of dissentients, or the expenses attendant thereon.

6. Inasmuch as the state is entitled to the benefit of the services of all its subjects, no creditor should be allowed to hold in bondage the soul, body or talents of any of its subjects, merely because he has been unfortunate.

7. If a debtor is not able to give an adequate reasonable and satisfactory account of the transactions causing his failure, his future earnings should be impounded for the benefit

of his past creditors until they have been sufficient to pay a reasonable percentage upon the dollar of his creditors' claims.

8. Dishonest and incompetent traders should be stigmatized as undischarged bankrupts, and should be incapable of engaging in trade or contracting debts without reasonable prospects of paying them.

9. There should be an official supervision over the accounts of all trustees.

10. A central bureau should be established in each province, presided over by a superior Court Judge by whom all bankruptcies would be supervised, thus ensuring both uniformity and honesty of administration.

11. The guiding principle should be "the estate for the creditors." The procedure should be so simple and expeditious as to produce the speediest and best results.

12. Every debtor should be compelled to submit a full statement of his assets and liabilities and the reasons for his failure at the first meeting of his creditors and should thereafter be examined in open Court before a Judge in the presence of his creditors, and should thereupon be called upon to answer all questions which might be put to him by counsel or any of his creditors with regard to his affairs, and any prevarication or failure to make a satisfactory explanation should be punishable as contempt.

13. The bankruptcy law should be available to all debtors both traders and non-traders.

14. The wage earner and the possessors of small estates who perhaps have fallen into the hands of loan sharks, should be enabled to have their estates administered in bankruptcy at a minimum of expense.

15. The present system of appointing assignees has been found in the main to work satisfactorily and subject to the control of creditors, should be permitted to continue, but for the administration of small estates and estates over which creditors do not care to take control, a salaried official should be appointed in each province, who would officially supervise all such small bankruptcies and enable justice to be done both to the creditor and the debtor without undue expense.

I should like to conclude this paper by an extract from the report of the committee appointed in 1906, by the English Board of Trade, which report was published in 1908. The committee in its report says:—

"The evidence and documents placed before us do not disclose any dissatisfaction on the part of the commercial community with the main features of the existing law and procedure; while evidence and statistics from official sources shew that there has been a large reduction in the amount of insolvency throughout the country since the present system came into force. The matters of complaint and suggestions for reform of the law which we have had to deal with have principally related to special incidents of the law and branches of its administration."

MUNICIPALITIES AND HIGHWAYS.

The rapid advance in certain lines of development in Canada is sometimes strikingly illustrated by provincial and Dominion statutes. Legislatures usually move slowly, but occasionally in seeking to fulfil their regulating powers hysterical efforts are made to keep pace with the advancing tide of progress or perhaps to satisfy clamorous constituents, by passing rather startling restrictive measures. A good example of this is seen in the amendment to the Ontario Motor Vehicles Act, whereby the owner or driver of a motor vehicle, simply by reason of his being on a highway with his motor, is by statute held guilty of wrongdoing in case of an accident until he proves his innocence. This, of course, is a subversion of all ideas of British justice, but no doubt the Legislature recognizing its helplessness to regulate properly the rapidly growing traffic, sought to pacify a section of the community by such an unfair piece of class legislation.

Ten years ago very few of the general public outside of the most skilled electricians and consequently very few members of Parliament would have dreamed of the very extensive development shortly to be made in the application and transmission of electrical energy, or the part that the great waterways of Canada were and are yet to play in the industrial development of the country. Consequently when in 1902, a syndicate composed of Mr. James Ross, of Montreal; Mr. William Mackenzie, Mr. Henry M. Pellatt, Mr. Frederick Nicholls, and Mr. S. G. Beatty, all of Toronto, made application to the Canadian Parliament for the incorporation of a company for the purposes among others to carry wires for

electric power over any bridge across the Niagara river and connect with the wires of any similar company in the United States, and further to conduct electricity along or across any public highway as fully set forth in the act of incorporation, one can well understand the dazzling picture that the prospect of such a pioneer company in full operation would present. The act, it is true, contained many restrictive clauses of a more or less mild nature, sufficient, as it was no doubt thought, to regulate in the interest of the public the operations of a company so strikingly and manifestly philanthropic in its intentions. One side of the shield, however, seems not to have been turned, and while the country as a whole was undoubtedly to receive a great impetus from this private enterprise, the danger and inconvenience involved was so obscured as to call for the subsequent judicial comment that "the like safeguards (contained in other charters) are conspicuously omitted from the Act of 1902. It cannot be because the danger of electrical transmission is being lessened by efflux of time, but perhaps there was not sufficient vigilance exercised during the passage of this Act in the interests of public safety." This comment is also the gist of the judgment of the Court of last resort in the same case, *The Toronto and Niagara Power Company v. North Toronto*. The Judicial Committee of the Privy Council merely interpreted the text of the existing Dominion legislation as they found it. This legislation, like most legislation, was passed in an effort to meet two conflicting interests, the encouragement of private enterprise to result in a certain public benefit, on the one hand, and the protection of municipal rights in municipal property on the other. The growing list of decisions from the Privy Council adverse to municipalities where their rights come into conflict with the claims of private corporations, can be traced in almost every case to the tender regard entertained by Parliament for the incorporators of companies, or as above expressed "insufficient vigilance for public safety."

Various amendments and circuitous clauses are incorporated in many of these charters, which upon their face look sufficiently protective, only to be found on more exhaustive examination to be annulled or so modified by other sections as to lose entirely their apparent effect. Even skilled Judges and interpreters of the law are sometimes misled. For such a condition of things the only hope is in better legislation

more clearly expressed. There can be no doubt that public sentiment as represented by members of Parliament will find a means of holding the scales fairly and evenly, so as not unduly to discourage private enterprise, and at the same time fully protect all existing rights.

The judgment in the case referred to is significant only in so far as it raises the presumption that there may be other companies in existence with similar sweeping powers, who will not hesitate to use them if challenged. There is also the feature which is sure to be realized at almost any moment, of the tremendous danger to life involved in the use of crowded thoroughfares for placing poles and wires for conveying heavy loads of electric power. That any private company, no matter how capable or how good its intentions, should be absolutely empowered without restraint of any sort in the conduct of works attended with such risks, apart altogether from the inconvenience occasioned to the highways, is hardly to be accepted by a public so watchful of its rights as the Canadian people usually are. It is safe to assume that the people of Canada, who are the final judges in cases depending on Dominion legislation, when dissatisfied with Privy Council decisions, will insist on their views being so clearly expressed on the statute books, that there will be no difficulty in interpretation. Parliament will, no doubt, in dealing with the matter, endeavour without hysteria, to find the proper remedy.

T. A. GIBSON.

EDITORIAL.

THE BALKAN QUESTION.

While negotiations are still in progress at the peace conference in London, it is unwise to comment on the result of the recent conflict in the Balkans, but undoubtedly the result will be that this question, so long the bug-bear of European diplomacy, will finally be set at rest, and that the Turk will ultimately be forced back into Asia Minor, where he will be more in accord with his environment. With this object in view the troublesome question of the balance of power is for the moment pushed into the background.

THE PANAMA CANAL.

Now that the excitement of the election contest is past, the United States will be in a position to take a normal view of mundane things, and no one doubts, least of all Great Britain, that the recent ebullition contained in President Taft's pre-election utterances on behalf of the Panama Canal, will be repudiated, for the American people are too just and fair-minded to stand idly by and allow their treaty obligations to be set at naught. The principle of neutralization of the Panama Canal, and subjecting it to the same regime as the Suez Canal, was the avowed object of the Hay-Pauncefote Treaty, of 1901, and without doubt the new President of the United States and Congress will see that this object is duly carried out.

In a recent issue of the *Law Times*, a *resumé* of the judgment of the Privy Council was given in the case of *The Toronto Niagara Power Company v. The Town of North Toronto*, and in this issue will be found an article by Mr. T. A. Gibson, the solicitor for the town of North Toronto, who in conjunction with Sir Robert Finlay, appeared when the case was being argued.

BILLS IN PARLIAMENT.

As will be surmised, the great difficulty with bills of Parliament, both Dominion and Provincial, has hitherto been the lack of either skill or a sufficient consideration by the

framers of these bills, previous to being brought before Parliament. In Great Britain the draughtsmen of parliamentary bills are chosen from the ablest lawyers in the country, men whose knowledge of parliamentary work and previous as well as impending legislation enables them to place before Parliament, bills, the object of which it is exceedingly difficult to defeat. Men of this calibre are remunerated in a manner commensurate with the importance of the work which they are employed to do, and there is no reason why men of equally high standing should not be employed in the performance of the same important work in Canada.

THE PROPOSED NAVAL CONTRIBUTION.

The announcement made by the Right Honourable R. L. Borden, Prime Minister of Canada, that the Government would make a direct grant of \$35,000,000 to build and equip three modern dreadnoughts of the latest type, has been received on all sides with satisfaction, thus shewing not only to Great Britain, but to the world at large, the intention of Canada to assume her proper share in the defence of the Empire.

Opinions may differ as to the proper method to be adopted by Canada in support of the navy, for although the grant proposed was called an emergency grant, as will be seen from the opinion expressed by the *Glasgow Herald* which is here quoted. No emergency exists, nor is the mother country unwilling to continue to bear the burden she has so long and so ably borne.

The *Glasgow Herald* (Independent) says: "The Dominions are not, speaking correctly, coming to the assistance of a tired and exhausted motherland.

"The motherland is not tired, and is very far from being exhausted. Great Britain, as every statesman from the overseas Dominions admits, is more full of energy and enthusiasm and of the industrial life and ability to maintain her place in the world than she ever has been. Her people are as willing and able as ever to bear the burdens necessary to keep her supreme at sea. There should be no mistake about the meaning of the contributions by the Dominions. No contribution from any of the Dominions, whether in the form originated by New Zealand and now adopted by the Malay States can relieve the mother country from the responsibility of maintaining an all-powerful navy."

Far from relieving the burdens of the British taxpayer the *Herald* declares that in one sense the contribution by the Dominion will impose on Great Britain a fresh burden. It is one thing to build ships and quite another thing to man them. A Dreadnought can be constructed in less than two years. The British bluejacket's training extends over seven years, during which period the whole expense will have to be borne by the British taxpayers.

In the article quoted it is stated that it takes but two years to build a dreadnought, while it takes seven to make a seaman, and since there is no crisis which demands an immediate grant, it would probably much better meet the wishes of the people of Canada at large, were the money granted to be used in the upbuilding of a Canadian navy. True, there is not the facility for the building of modern battle-ships in Canada, but this can be readily overcome and Canadian money can be spent in Canada in the payment of Canadian workmen or men imported from Britain to work in Canada to build the battle-ships, retaining to Canadians that fundamental right of the British Constitution of designating where their money should be spent.

The most that can be said for Mr. Borden's plan, admirable as it undoubtedly is, is that it is but a makeshift, and Canada would have to begin not only building a navy, but naval yards for the construction of ships, in the near future, and why not begin now.

NEW WAY TO MAKE LAWYERS.

The college-trained young lawyer is now in the spotlight of educational controversy. It is admitted that a course in a school of law is indispensable, but it is also agreed that young men fresh from law classes lack something of importance which those who were graduated in the old days directly from a lawyer's office possessed. The educators are not very explicit in naming the "lacking qualities." Perhaps the student spends too much time with his books and not enough in the court-room. One facetious critic thinks the law schools ought to put in a course of Starvation, original research work to be required the first five years after graduation. As a substitute for this graduate work in Starvation, Chancellor Elmer Ellsworth Brown, of New York University,

and some of his university associates, suggest a solution of the difficulty through statutory provisions under which law school graduates, fresh from their studies, might practice in certain Courts under supervision analogous to that to which the hospital interne is subjected. It has even been suggested that a special Court might be constituted for the purpose, in which such supervised practice might, in certain classes of cases, be provided gratuitously for clients who are unable to pay. Humanity has managed to struggle along with the medical interne. Why not give the young lawyer his chance at hospital practice?

PERSONAL.

Mr. A. B. Morine, K.C., has resumed practice at St. John's, Nfld. It will be remembered that Mr. Morine, some years ago, came from St. John's, and entered into practice in Toronto, subsequently taking an active part in politics. According to a report from St. John's, Mr. Morine does not intend for the present to enter into the political life of the colony.

Mr. William E. Banton, after several years' practice at Enderby, is now associated with Messrs. Woodworth & Creagh, Vancouver.

Dr. Lemuel Allen Currey, K.C., one of the most able lawyers in the Dominion, was found dead in bed. He was 58 years of age, and a graduate of the University of New Brunswick and Harvard Law School.

W. F. Guild, a former student in the office, has become a member of the law firm of Campbell, Pitblado & Co. Mr. Guild in the recent examinations headed the list in the solicitor and barrister divisions, thereby gaining the scholarship presented by the law society.

M. L. M. Skelton, who has been studying law in the office of W. W. Livingstone, for the past three years, will leave for Regina, where he will practise in the office of Bal-four, Martin & Co. Mr. Skelton will be missed in Battle-

ford, and takes with him the best wishes of a whole host of friends.

The partnership of Daniel O'Connell and John R. Corkery as the law firm of O'Connell and Corkery has now been announced. Mr. Corkery, who is a Peterborough boy, has been connected with Mr. O'Connell's office since the completion of his course at the law school in May last. He was called to the Bar in September.

At the first of the year a change took place in the well-known firm of lawyers, Messrs. Perkins, Fraser and Gibson, of 53 Queen street. Mr. J. Goodwin Gibson is retiring from the firm, and Mr. Harold D. McCormick is taking his place, the new firm name being Perkins, Fraser and McCormick. Mr. Gibson is leaving shortly for Vancouver, where he will reside in future, having joined the legal firm of Bowser, Reid and Wallbridge, of that city.

The following are the candidates for admission to the practise of law at the Bar of the district of Quebec examinations of January, 1913: Maurice Brasset, Charles Darveau, F. X. Godbout, Maxime Morin, Elisee Theriault, Quebec; Raoul Simard, Baie Saint Paul.

MANITOBA LAW SCHOOL EXAMINATIONS.

The pass list is as follows:—

CALL.

J. H. Woodside, W. F. Guild, J. D. Cameron, C. K. Newcombe, E. G. Hetherington, W. Martin, and E. D. McMeans, all with honours.

H. S. Scarth, L. T. Tweed, W. J. Rowe, L. A. Masterman, A. V. Darrach, N. W. Kerr, O. G. McNabb, E. G. Trick, G. A. Colquhoun, and H. Wheeldon.

ATTORNEY.

W. F. Guild, C. K. Newcombe, J. H. Woodside, and E. G. Hetherington, all with honours.

W. Martin, L. A. Masterman, H. S. Scarth, A. V. Dar-
rach, J. D. Cameron, W. J. Rowe, N. W. Kerr, L. T. Tweed,
E. D. McMeans, O. G. McNabb, H. Wheeldon, E. G. Trick,
E. M. Beaudry, and A. U. Le Bel.

ATTORNEY—PART 1.

R. E. Atkinson, G. C. Lindsay, E. W. Gerrand, M. H.
Teskey, R. Hoskins, A. B. Elliott, G. W. Culver, H. Gyles,
J. W. Mitchell, A. H. J. Andrews, A. H. Warner, H. C. Mor-
rison, R. Cole, J. K. Morton, W. J. Major, A. B. Bell, D. Mc-
Kenna, M. L. Bell, C. W. Jackson, A. T. Hawley, all with
honours.

F. T. Taylor, B. V. Richardson, H. B. Burton, J. E.
Reynolds, J. H. Radford, F. A. E. Hamilton, G. E. Winkler,
J. F. Waller, J. M. O'Grady, C. H. Dixon, H. C. H. Bray-
field,, G. C. M. Boothe, J. S. Craig, G. F. O'Grady, J. T.
Beaubien, and A. U. Le Bel.

FIRST INTERMEDIATE.

S. Abrahamson, J. Isaacs, and J. L. McManus, all with
honours.

J. W. Dempsey, A. M. Shinbane, A. E. Neville, S. H.
Potter, R. M. Maclean, A. McDonald, J. E. Ramsden, C. D.
Roblin, F. G. Thompson, H. L. Jackson, F. I. Simpson, J. M.
Carmichael, F. M. Ferg, W. J. Hummel, W. E. Davidson,
R. B. Kilbourne, A. S. Baird, Miss Melrose Sissons, R. Bird,
H. W. Porter, G. A. Elliott, W. L. Mawhinney, H. E. Ken-
nedy, G. F. D. Bond, J. L. Salterio, A. C. Reid, J. A. David-
son, H. L. Cathrea, F. G. Warburton, J. D. McRae, and C.
M. Graban.

SECOND INTERMEDIATE.

G. A. E. Bury, R. M. Pearson, W. M. Noble, J. J. Milne,
M. M. Perdue, and C. L. Simmonds, all with honours.

R. McQueen, A. M. Graham, H. J. Riley, W. R. Sexsmith,
C. D. Bates, C. W. Chappell, H. Gill, K. R. Kennedy, R.
McKay, D. W. Yuill, F. F. Sewell, D. Nicholson, and E. R. R.
Mills.

SASKATCHEWAN LAW SCHOOL EXAMINATIONS.

The following candidates have been successful in the recent Saskatchewan Law Society's examinations:—

FIRST INTERMEDIATE.

S. Curtin, J. C. Speers, V. B. Lackey, W. J. Jolly, J. A. Strang, and A. F. Sample, of Regina; H. E. Hartney, Saskatoon; R. F. Hall, Humboldt; H. E. Ross, Moose Jaw, and V. J. Lindal, and E. T. Collins.

SECOND INTERMEDIATE.

F. J. Brigel, A. L. Geddes, and D. A. McNiven, of Regina; W. H. Holmes and P. J. Hodge, of Saskatoon; E. J. Campbell, Arcola; H. A. Ebbels, Weyburn.

FINALS.

H. G. Fork and J. E. Lussier, Regina; F. C. Hayes, Swift Current; E. A. S. James and E. McPheeters, Moose Jaw; R. S. Dean, Melfort; F. G. Atkinson, D. S. Walker and M. L. M. Skelton, Battleford; W. J. McDonald and E. S. Wilson, Yorkton; J. S. Price, W. M. Aseltine and B. M. T. C. Wakeling.

SPECIAL STATUTE AND PRACTICE.

D. Forrester and W. Amyot, Regina; M. A. Miller, Weyburn; J. W. Murray, J. Muir, Moose Jaw; S. M. Walker, Saskatoon; E. T. Heap, Prince Albert; Wm. Nicol, Foam Lake; J. H. Gunn.

SOME OBSERVATIONS ON THE BANK ACT AND BANKING AS CONDUCTED THEREUNDER.

The Bank Act as introduced into the House of Commons by the Minister of Finance, is practically a re-enactment of the existing Act, with some four additional provisions—two of which are extended privileges to the banks, viz., power to loan to farmers on the security of their live stock, and power to issue additional circulation notes to the extent of the bank's deposits of gold coin and Dominion notes with the trustees appointed to hold such "central gold reserves." The other two are additional safeguards to prevent a repetition of what happened in the case of the Farmers Bank, first to prevent fraud in the organization of a bank and afterwards to keep the management straight, by what is termed a stockholders' audit.

Without waiting to discuss the merit of the proposed audit, which in effect will be an audit of a few of the leading stockholders controlling the management as compared with an independent Government inspection and audit, the object of this short article is to call the attention of the public as to whether there are not other provisions more important by far to the great business community than those above mentioned, that should be introduced into the new Act, and in order to make apparent what some of these additional provisions should be, I will endeavour to point out some of the existing conditions that should be remedied.

In the first place the bank organization controlled and regulated as it is by the Bankers' Association and recognized by the Bank Act, is the most colossal, powerful and growing combination and monopoly, existing in the Dominion to-day. Other combinations and consolidations exist, but each is confined to one industry while the bank monopoly controls the whole circulating medium of all the industries, and of the whole business of the country—and how has it used its great power?

The aggregate paid up capital stock of all the banks in Canada is only \$118,000,000, about equal to nine months' income of our principal railway or three-fourths of the amount J. Pierpont Morgan has on deposit awaiting investment for his customers, yet to what a huge sum have the aggregate assets of these banks grown, in addition to the increased value to

which the \$118,000,000 paid capital has grown, viz., over \$260,000,000. How has this been accomplished? By levying exorbitant rates of interest on the business community and paying too small a rate of interest on deposits. The Act gives banks a right to charge 7 per cent. compound interest in advance daily, monthly, or in any periods they choose with other collection charges, and to pay any rate of interest on deposits that they may get together and decide on—now only three per cent.

At present the deposits aggregate over one billion dollars, four-tenths of which bears no interest and the other six-tenths bearing only three per cent. per annum.

Then, again, when a money scarcity or stringency arises, be it ever so slight, up goes the rate of interest, even on current loans. This is how the banks assist their customers over a shallow spot. What would be said of a landlord, who learning that his tenant was finding his business a little temporarily depressed raised the rent on him? Yet this is how the bank deals with its customers, and as there is no competition in the combine, it can do what it pleases in this respect. It is a fact that in the depression year of 1907, which was largely dreaded by the banks themselves, their income was larger than in the previous year, when there was no depression, because of the increasing of the interest rates. How many of the readers of this article have had the interest on their bank account raised within the past two months?

And thus it is that our bank presidents in their annual reports are able to shew such large profits, some of them over 20 per cent. per annum, after hiding away large sums in various ways. If an obscure chattel mortgagee were to let it be known that he made 20 per cent. on his investments he would be in jail next day as a criminal, but these exorbitant earnings are respectable in banking. If Shylock lived in Canada to-day, instead of feeling himself to be a self debased extortioner, he would be at the head of a prosperous bank, probably anticipating a knighthood.

Some years ago the legal rate of interest was reduced to five per cent. The maximum bank rate should not be more than the legal rate. Has it not been the greed for big profits that has wrecked nearly all the banks that have gone to the wall in the past 25 years, by taking large risks for the chance of making large profits.

Then again why should bank managers be allowed to send the people's deposits or the bank's moneys out of the country to speculate with when the country's own business needs it at home; and if they do, why should their returns not shew the amount invested in each foreign country, separately, and the nature of the investments, instead of as they do under the Act, bunch the whole foreign investments under the headings "Balances due by Banks," and "banking correspondents elsewhere than in Canada," "call and short loans elsewhere than in Canada," and "other current loans and discounts elsewhere than in Canada?" Surely the depositors and stockholders are entitled to know where their moneys are being invested, and how, and whether for speculative purposes on the New York stock market, or in some questionable Mexican venture.

In days gone by we had the statutes of Mortmain to prevent the accumulation of property in corporation hands. How long will it take the banks at their present rate of accumulation to possess the whole circulating wealth of the country? There should be some legislation brakes inserted in this Act.

An important question now is who is there in the House of Commons to stand up for the rights and interests of the business borrowing community. Who will have the courage? Will the large bank stockholder be unwilling or the large borrower dare to oppose the banking interests? *Nous verrons.*

PRO BONO PUBLICO.

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THE TIME TO TEST OUR FAITH IN ARBITRATION.

ERRATA.

An apology is due to E. F. B. Johnston, Esq., K.C., and James Bicknell, Esq., K.C., that owing to an error in reading the proof the names of these distinguished gentlemen were omitted from the articles which should have borne their names, namely: "A Divorce Court in Canada," and "The Advisability of Establishing a Bankruptcy Court in Canada." The editor is wholly to blame, and assumes entire responsibility for this regrettable mistake.

taken is not taken, the hearts of those whose hopes were high are saddened. And this meeting brings back to me the earnest, triumphant feeling that I had in my soul after I had visited almost every State in the Union, and urged the confirmation of the treaties which we had made with England and France, and then lived to find them defeated in the highest legislative body in the world, as some of the members of that body are in the habit of calling it. The defeat was more than a mere destruction of our hope as to the progress that might be made by those treaties, because the vote carried with it a proposition which, if established as our constitutional law, relegates the United States to the rear rank of those nations which are to help the cause of universal peace. For the proposition is that the Senate of the United States may not consent with the President of the United States

to a treaty that shall bind the United States to arbitrate any general class of questions that may arise in the future, but there must always be a condition that the Senate may subsequently, when the facts arise, determine whether in its discretion the United States ought to arbitrate the issue. Now I say that limitation upon the power of the United States as a Government to bind itself to obligations, to meet questions between nations with arbitration, is an obstruction not only to the progress of the United States but to the progress of the world in the matter of peace, for the reason that the nations of the world look to the United States, and properly look to the United States, as a leader in the matter of establishing peace, because we are so fortunately placed between oceans and without troublesome neighbors that we can go on without fear of consequences to establish a condition in which we shall settle every question by reference to an arbitral tribunal. It is because the nations of the world looked to us to do that, that the announcement of the doctrine by the Senate of the United States, that we have no power to make an arrangement of that sort for the future, except as we adopt each particular contract to arbitrate each particular question, presents to those of us who hope for universal peace so great an obstruction.

INCONSISTENCY OF THE PUBLIC WITH REGARD TO PEACE.

Now the difficulty about arguing is that when you get before an audience, everybody is in favour of peace. They are all in favour of peace. But when it comes to an election, the issue as to international peace does not play any part at all. The peace part of the political platform does not seem to affect anybody but the peace societies. And when you say to members of the Senate of the United States, "You are reaching a conclusion in which the people do not stand by you," they say, "Well, what of that, such an issue never affected a single vote at the election." Now we ought to make it control some votes, so that when a Senator rises in his seat and says, "The Senate has no power to make an obligation of this sort to bind our government to future policy of arbitration," we shall say, "Your constituents differ with you in that regard, and are looking for a Senator who will have a different constitutional view and who will not regard the sacredness of the Senate of the United States against binding

itself and the nation to future arbitration as more important than the attribute of full national sovereignty. If we are a nation at all, we must have power to bind ourselves as a nation to contracts that will not only uplift nations but uplift the world; and if we are to be limited by the fact that the Senate of the United States cannot confirm and cannot make a contract of that sort, then we have hobbled ourselves and our national sovereignty in the possibility of progress toward a higher and a more Christian civilization.

A TEST OF PRINCIPLE.

England made a treaty—France did, and there was no doubt about the confirmation by those governments of those treaties. If they could safely do it, why could not the United States? In what respect has it higher responsibilities and more valuable privileges to lose than those great nations as between nations? They may be expected to be as careful in the preservation of their sovereigns, and what may come by way of damage to them by future contracts; but it remains for the gentlemen who have exalted the Senate above everything to find in the Constitution something that prevents them from doing what must be done if the cause of universal peace is to prosper. But they say, "There may arise after you have made a contract some question coming within the described class that you do not want to submit, some question in which you are likely to be beaten, in which you are likely to suffer a great national loss." Well, you cannot make omelets without breaking eggs. You cannot always have a jughandled arrangement in international agreements. You must expect sometimes to be beaten. A sure thing among gentlemen who bet even is not regarded as the most honourable standard for making bets; and certainly one who would refuse to abide the judgment of a Court unless he knew in advance that the Judge was with him, is not the kind of a litigant that we are in the habit of welcoming into Courts.

ARBITRATION AND THE PANAMA CANAL.

And that leads me to a reference that has been made here with reference to the Panama Canal. My friend, Mr. Clews, differs with me and with the Administration in the construction of that treaty. That is all right. I suppose questions

before have arisen as to construction of contracts in which good honest people have been on both sides. Now that presents to me a very significant and useful example with respect to arbitration. A good many people are saying, "Don't arbitrate because you are going to lose. This is our canal, and while England is making a point of it, England would not fight about it, and, therefore, why give up when you are not likely to get an arbitration that will be satisfactory to you and your view of the construction?" Even if this were correct as to probability of result, which I need not, and do not admit, that is just the time when I am in favour of an arbitration. I mean that I have not gone about the country urging arbitration for the purpose of using that as a platform subject to attract the attention and approval of the audience. I hope I was more conscientious in advocating what I did advocate through the country on that head, and when I said to them that we never would have an arbitration that would be effective until we entered into an obligation that brought us into arbitration when we did not think we would win. That is the time that tests your faith in that method of settlement. Now I am willing, and indeed I would be ashamed not to be willing, to arbitrate any question with Great Britain in the construction of a treaty when we reach the exact issue which there is between the two nations. There need not be any public doubt on that subject so far as this administration is concerned. When there is a difference that cannot be reconciled by a negotiation and adjustment, then we are entirely willing to submit it to a impartial tribunal. I am hopeful that we may get it either to settlement or to submission before the Administration, in which I have the honour to be a dissolving view, shall cease; but it may not be because these international negotiations move slowly. But I am glad to take this opportunity in this presence to say that if the time comes, there will be no doubt about what I will do in respect to the submission of that question, as far as my power goes, to an impartial tribunal for its settlement, if that is necessary.

A STEP TOWARD INTERNATIONAL PEACE.

I said that I rose with regret, and I have explained to you why. I rise also with pleasure because it is a great pleasure to believe that associations like this continue the

feeling in favour of peace, and that, after all, though the defeat of those treaties in the Senate was a great disappointment, the making of them and the agitation with respect to them was a step toward the goal which we all hope to reach. My own idea was that if we could make those treaties, they would form the basis for a treaty with every other nation and the United States, and then between other nations than the United States, and finally, by interlocking and intertwining all the treaties, we might easily then come to the settlement of all international questions by a Court of arbitration, a permanent, well-established Court of arbitration, whose powers would be enforced by the agreement of all nations, and into which any nation might come as a complainant and bring in any other nation as a defendant and compel that defendant nation to answer to the complaint under the rules of law established for international purposes, and under the rules of law which would necessarily, with such a Court grow into an international code that would embrace all the higher moral rules of Christian civilization. Now that is the ideal that I had. It is the ideal that I still cherish, and while we received a body blow in taking away our power to enter into such an obligation for an arbitral Court by the view of these constitutional lawyers who would limit the power of the Senate to contract for the future because it might diminish their own power in the future, nevertheless, we may hope that as time goes on those views will be modified. We may hope that the cause of peace may command more votes than it seems to have done in the past. It is not perhaps a question for political discussion in the sense of being a party question. It is one that is bound to grow and quietly establish itself, and perhaps that influence will work even upon that rock-ribbed body, the Senate of the United States.

SHOULD THE PANAMA CANAL TOLLS CONTROVERSY BE ARBITRATED?

The diplomatic controversy between Great Britain and the United States respecting the legality of the remission of Panama Canal tolls to American vessels engaged in our coast-wise trade, resolves itself into two main questions: (1) Does the phrase "of all nations" contained in Article III of the Hay-Pauncefote Treaty include the United States, or does it mean all nations *other* than the United States? (2) Is the remission of such tolls a "discrimination against any such nation" in the sense of the treaty?

OUR LEGAL OBLIGATIONS IN THE PREMISES.

Article III, Rule 1, of the Hay-Pauncefote Treaty of 1901 provides:

"The canal shall be free and open to the vessels of commerce and of war of *all nations* observing these Rules, on terms of entire equality, so that *there shall be no discrimination against any such nation*, or its citizens or subjects, in respect of the conditions or charges of traffic, or otherwise. Such conditions and charges of traffic shall be just and equitable."

Article I of the Convention concerning Arbitration between the United States and Great Britain, signed April 4th, 1908, declares:

"Differences which may arise of a *legal nature or relating to the interpretation of treaties* existing between the two Contracting Parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the Convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two Contracting States, and do not concern the interests of third parties."

This treaty constitutes a legal obligation. It is a solemn compact between two great nations,¹ and is as binding in law as are valid contracts between private individuals or corporations. It should be especially noted that it binds us to refer to The Hague Tribunal differences of a *legal nature*, and particularly those relating to the *interpretation of treaties*, which

have not been settled by diplomacy, unless such differences affect the vital interests, independence, or honor of either State or concern the interests of third parties.

"'A treaty,' says Plumley, umpire, in the case of the heirs of Jean Maninat (French-Venezuelan Commission of 1902, Ralston's Report, 44, 73), 'is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties, and by the greater magnitude of the subject matter. To be valid, it imports a mutual assent, and in order that there may be such a mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties understand to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters now in dispute.'" Cited by Ralston, *International Arbitral Law and Procedure*, p. 4.

It will not be seriously maintained that the existing controversy falls within the scope of any of the exceptions above named to the application of the treaty. Certainly the difference is not one which affects the vital interests, the independence, or the honor of either State, as these terms are usually understood. Such a contention would be too absurd for serious argument. It may seem at first thought as though the interests of third parties were involved in the settlement of this dispute. But a little reflection will lead to the conviction that the difference is one which does not concern the interests of other States. Their interests may be *affected* (as, indeed, is often the case when there are treaties between two States), but they are not directly *concerned* in the dispute itself, which is solely between Great Britain and the United States.

Inasmuch as the Arbitration Treaty in question was only concluded for a period of five years from date of the exchange of ratifications, it has been suggested that the United States may avoid her obligations, if any, to Great Britain in the matter of the Panama tolls by refusing to renew the Convention upon its expiration in May, 1913. Even supposing that the United States Government were willing to fly in the face of public sentiment and attempt to evade the issue in this disgraceful manner, it would probably be in vain; for the controversy would be regarded as having arisen prior to the expiration of the treaty, and the United States has agreed to arbitrate *existing* differences, i.e., existing under the treaty, or while the treaty was still in force.

It has thus been demonstrated that the United States is *legally* bound to arbitrate the dispute with Great Britain re-

specting the legality of the remission of the Panama Canal tolls to American vessels engaged in the coastwise traffic. What are our *moral* obligations in the premises

OUR MORAL OBLIGATIONS IN THE PREMISES.

The United States has been the consistent champion of international arbitration ever since this ancient practice was revived in modern times by the Jay Treaty of 1794. Among the many arbitrations to which this country has been a party, might be indicated various important boundary disputes, the Alabama Claims and Bering Sea Controversies, and the Northeastern Fishery Question (the latter involving an interpretation of Article I of the Treaty of 1898). As a keen student and practitioner of international law has well said:

"The experience of the United States affords abundant evidence of the fact that if an international controversy is of a legal character, it is capable of adjustment by arbitration whether the claims involved are national or private; whether the issue is one of fact or of law; whether the difference is one concerning the ownership of land or the control of water; whether the honour of the State is involved, or even its most vital interests."²

² Hyde, in 2 Proceedings of the Second National Peace Congress (1909), p. 232.

For a very complete account of the arbitrations to which the United States had been a party up to 1898, see Moore's monumental History and Digest of International Arbitration, in 5 vols.

See also Darby's International Tribunals (4th ed., 1904), for a brief digest of modern arbitrations. Out of 228 instances of "formal" arbitrations occurring between 1794 and 1901, cited by Darby, the United States was a party in 68 cases, Great Britain in 81, France in 28, Prussia or Germany in 17, and Russia in 8.

THE UNITED STATES AT THE FIRST HAGUE CONFERENCE.

At the First Hague Conference of 1899 the United States was particularly active in urging arbitration and assisting in the creation of the so-called Permanent Court of Arbitration at The Hague. Our Government subscribed to the following declaration contained in the Arbitration Convention adopted at The Hague:

"In questions of a legal nature, and *especially in the interpretation or application of International Conventions*, arbitration is recognized by the Signatory Powers as the most

effective, and at the same time the most equitable means of settling disputes, which diplomacy has failed to settle."³

³ Article 16, of the Convention of 1899 for the Pacific Settlement of International Disputes. At the Second Hague Conference, the following recommendation was added: "Consequently, it would be desirable that, in disputes regarding the above-mentioned questions, the Contracting Powers should, if the case arise, have recourse to arbitration, in so far as circumstances permit. Article 38 of the First Hague Convention of 1907.

THE UNITED STATES AT THE SECOND HAGUE CONFERENCE.

At the Second Hague Convention of 1907 the United States was one of the most vigorous advocates of a scheme for obligatory arbitration, and the American delegation proposed a project for a Court of Arbitral Justice which, if adopted, would have transformed The Hague Tribunal, or so-called Court of Permanent Arbitration created in 1899, into a real permanent High Court of International Justice, or Supreme Court of the Nations. Both schemes failed of adoption, but the Contracting Powers represented at The Hague declared themselves "unanimous": "(1) In admitting the principle of obligatory arbitration. (2) In declaring that certain disputes, *in particular those relating to the interpretation and application of the provisions of international agreements, may be submitted to obligatory arbitration without restriction.*" A Convention providing for the establishment of a system of real international justice will probably be agreed upon at the Third Hague Peace Conference.

THE INTERPRETATION OF TREATIES.

However authorities on international law may differ in their views as to the possible scope of arbitration as applied to the settlement of international disputes, there appears to be a consensus of opinion among them that interpretation of treaties is a proper subject for judicial determination. The rules for such interpretation are derived from general jurisprudence, and there is general agreement among the authorities as to the more important of these rules.⁴

⁴ On the Interpretation of Treaties, see especially: Adler, in 26 Law Magazine Review (5th series, pp. 62ff. and 164ff.; Bonfils, Manuel de droit int. public (Fauchille's 5th ed.). Nos. 835-844; 1 Corbett, Cases, pp. 328-333; Hyde, in 3 American Journal of Int. Law (1910), pp. 46ff.; Hershey, Essentials of Int. Public Law (1912), sec. 299; 2 Fiore, Nouveau droit int. public (Antoine's French trans.). Nos. 1032-1046; Hall, Int. Law (Atlay's 6th ed.),

pp. 327-334; 5 Moore, *Int. Law Digest*, secs. 763-764; 1 Oppenheim, *Int. Law* (1905), secs. 553-554; 2 Phillimore, *Commentaries upon Int. Law*, Pt. V., ch. 8, secs. 64-95; Pic., in 17 *Revue générale de droit int. public*, (1910), pp. 5-35; 2 Pradier-Fodéré, *Traité de droit int. public*, Nos. 1171-1188; Taylor, *A Treatise on Int. Public Law*, secs. 377-393; Vattel, *Le droit des gens* (Eng. trans. in 1859), Bk. II., ch. 17; 2 Wharton, *Digest of Int. Law*, sec. 133; Wheaton (Atlay's ed.), sec. 287a; Wilson, *Handbook of Int. Law*, ch. 7; Woolsey, *Introduction to Int. Law* (6th ed.), sec. 113.

"The method of interpretation consists in finding out the connection made by the parties to an agreement between the terms of their contract and the objects to which it is to be applied. This involves two steps. One is to ascertain what has been called the 'standard of interpretation'; that is, the sense in which the various terms are employed. The other is to learn what are the sources of interpretation; that is, to find out where one may turn for evidence of that sense."^{*}

^{*} Hyde, in 3 *American Journal of Int. Law* (1910), p. 46.

The main purpose of interpretation is to determine the real intentions of the parties. To this end diplomatic correspondence, or interchange and expression of views leading up to the final negotiation and ratification of the treaty, would be all-important. For instance, the fact that an amendment was lost in the Senate providing that the United States should reserve the right to discriminate in respect to charges in favour of our own citizens, would not be decisive in itself. All the circumstances leading up to this vote would have to be taken into account. Besides, there are many other conditions surrounding the case which would have to be considered, such, for example, as the bearing of the Clayton-Bulwer upon the Hay-Pauncefote Treaty, more particularly whether the latter treaty was the main consideration for the abrogation of the former.

THE QUESTIONS FOR JUDICIAL DETERMINATION.

As stated at the outset, one of the main questions for judicial determination is: "Does the phrase 'of all nations' contained in Article III of the Hay-Pauncefote Treaty include the United States or does it mean all nations *other* than the United States?" There seems here to be an ambiguity of language to which well-known rules of interpretation may be readily applied. But granted that Great Britain's interpretation of this phrase is correct, there remains the question: "Is the remission of such tolls a 'discrimination against any such nation,' in the sense of the

treaty," or is it perhaps a mere subsidy? Upon questions of this kind our Courts are constantly passing judgment. They are frequently called upon to decide whether a given practice, such as the granting of rebates in disguised forms, constitutes a discrimination or rebate in the sense forbidden by our statute or common law. Clearly these are questions which can and should be "settled by reference to known rules."

'The above phrase set in quotation marks in Westlake's famous definition of a legal question. This definition has been accepted, so far as the writer is aware, by all authorities who have discussed this problem. Political differences are those which result from serious conflicts of political, social, racial, or economic interests. They are usually regarded as questions of national policy to the solution of which it is either difficult or impossible to apply judicial methods.

DIFFICULTIES IN THE WAY OF ARBITRATION.

It has been maintained that there are practical difficulties in the way of a just and impartial arbitration of this question, arising either from defects inherent in the arbitral system or from the alleged impossibility of finding Judges who do not belong to interested nations.

It may be admitted that so-called Courts or commissions of arbitration too often, in the past, have sought a solution of the controversy submitted to them by way of compromise, rather than through the application of legal principles to the case in hand. But in the administration of international justice, during recent years, great progress has been made in the direction of substituting better methods, higher ideals, and more carefully selected Judges for mixed commissions and occasional tribunals. Arbitral decisions are coming more and more to represent the application of principles of law and equity by trained jurists working in a judicial spirit instead of by arbiters animated by a mere desire to compromise the issue. In a word, in the settlement of international differences, more advanced judicial methods and a better judicial organization are taking the place of the older system of haphazard, compromising arbitration.

The defects in the arbitral system of the past have been due mainly to a want of care in the selection of Judges, or to the lack of a carefully drafted agreement clearly defining the questions at issue and the rules of procedure to be observed. But none of these defects are beyond remedy, and the Hague Conferences of 1899 and 1907 have furnished us

not merely with a better method of selecting Judges than was previously in vogue, but also with an elaborate code of arbitral procedure which should prove adequate in most cases.

As to the alleged impossibility of finding fair and impartial Judges to settle this particular disagreement, it may again be admitted that the difficulty is a real one. But we are here dealing with a difficulty—not an impossibility. It is true that all the maritime powers of the world (including those of South America) are in a sense interested in the decision of this case. It has been suggested that "Switzerland is perhaps the only country capable of furnishing international jurists of high standing, who would probably be free from all pressure of selfish public opinion when acting as Judges of the case."¹

¹ *The Outlook* for Dec. 7th, 1912.

Switzerland could undoubtedly furnish them. So could many other countries, including Great Britain and the United States. In a tribunal composed wholly of arbitrators selected by the interested Governments for the settlement of the Alaskan boundary dispute (1903), Lord Alverstone, the President of the Tribunal, sustained the contention of the United States that it should continue to enjoy a continuous strip of mainland separating the British territory from the inlets of the sea. In nearly all countries of the civilized world there are to-day international jurists who, whether engaged in the practice of law at the bar, administering it on the bench, or holding chairs in our Universities and Law Schools, possess the requisite knowledge, courage, and judicial spirit to declare and administer the law applicable to this and similar differences of a legal nature. The time has, indeed, passed when it can be seriously maintained that such disputes are incapable of judicial solution. Least of all can the United States afford to refuse to settle such a controversy whether by arbitral or judicial methods.

PANAMA CANAL ACT.

PROTEST BY THE BRITISH GOVERNMENT.

SIR EDWARD GREY'S DESPATCH.

The second British protest against violation by the United States of the Hay-Pauncefote Treaty alleged to be implied in the United States policy regarding Panama Canal charges was presented on Monday afternoon by Mr. Bryce to Mr. Knox, Secretary of State.

The protest is contained in a despatch dated November 14 from Sir Edward Grey to Mr. Bryce, which was issued on Monday as a Parliamentary paper [Cd. 6451], and lays down the considered views of the British Government on the whole controversy. It takes the form of a reply to Mr. Taft's memorandum and states with admirable lucidity the case for the British interpretation of the Hay-Pauncefote Treaty.

THE CASE FOR GREAT BRITAIN.

Sir Edward Grey says that a careful study of the President's memorandum has convinced him that Mr. Taft has not fully appreciated the British point of view and has misunderstood Mr. Mitchell Innes' note of July. 8.

THE "ALL NATIONS" INTERPRETATION.

The President in his memorandum treats the words "all nations" as excluding the United States. He argues that, as the United States is constructing the Canal at its own cost on territory ceded to it, it has, unless it has restricted itself, an absolute right of ownership and control, including the right to allow its own commerce the use of the Canal upon such terms as it sees fit, and that the only question is whether it has by the Hay-Pauncefote Treaty deprived itself of the exercise of the right to pass its own commerce free or remit tolls collected for the use of the Canal.

For the reasons they have given above his Majesty's Government believe this statement of the case to be wholly at variance with the real position. They consider that by the Clayton-Bulwer Treaty the United States had surrendered the right to construct the Canal, and that by the

Hay-Pauncefote Treaty they recovered that right upon the footing that the Canal should be open to British and United States vessels upon terms of equal treatment.

Sir Edward Grey says that the case cannot be put more clearly than it was put by Mr. Hay, who, as Secretary of State, negotiated the Hay-Pauncefote Treaty, in the account of the negotiations which he sent to the Senate Committee on Foreign Relations (Senate Document No. 746, 61st Congress, 3rd Session): "These rules are adopted in the treaty with Great Britain as a consideration for getting rid of the Clayton-Bulwer Treaty." If the rules set out in the Hay-Pauncefote Treaty secure to Great Britain no more than most-favoured-nation treatment, the value of the consideration given for superseding the Clayton-Bulwer Treaty is not apparent to his Majesty's Government. Nor is it easy to see in what way the principle of Article 8 of the Clayton-Bulwer Treaty, which provides for equal treatment of British and United States ships, has been maintained.

To the argument that the words "all nations" cannot include the United States because, if the United States were at war it is impossible to believe that the country could be intended to be debarred by the treaty from using its own territory for revictualling its warships or landing troops, Sir Edward Grey replies that

The Hay-Pauncefote Treaty of 1901 aimed at carrying out the principle of the neutralization of the Panama Canal by subjecting it to the same régime as the Suez Canal. Rules 3, 4 and 5 of Article 3 of the treaty are taken almost textually from Articles 4, 5 and 6 of the Suez Canal convention of 1888. At the date of the signature of the Hay-Pauncefote Treaty the territory, on which the Isthmian Canal was to be constructed, did not belong to the United States, consequently there was no need to insert in the draft treaty provisions corresponding to those in Articles 10 and 13 of the Suez Canal Convention, which preserve the sovereign rights of Turkey and of Egypt, and stipulate that Articles 4 and 5 shall not affect the right of Turkey, as the local sovereign, and of Egypt within the measure of her autonomy, to take such measures as may be necessary for securing the defence of Egypt and the maintenance of public order and, in the case of Turkey, the defence of her possessions on the Red Sea.

Now that the United States has become the practical sovereign of the Canal his Majesty's Government do not question its title to exercise belligerent rights for its protection. Other arguments are advanced to emphasize the conclusion that any system by which particular vessels or classes of vessels were exempted from the payment of tolls would not comply with the stipulations of the treaty that the Canal should be open on terms of entire equality, and that the charges should be just and equitable.

The President in his memorandum argues that if there is no difference, as stated in Mr. Mitchell Innes' note of July 8, between charging tolls only to refund them and remitting tolls altogether, the effect is to prevent the United States from aiding its own commerce in the way that all other nations may freely do. This, Sir Edward says, is not so. His Majesty's Government have no desire to place upon the Hay-Pauncefote Treaty an interpretation which would impose upon the United States any restriction from which other nations are free or reserve to such other nation any privilege which is denied to the United States. Equal treatment, as specified in the treaty, is all they claim.

It has been argued that as the coastwise trade of the United States is confined by law to United States vessels, the exemption of vessels engaged in it from the payment of tolls cannot injure the interests of foreign nations. It is clear, however, that the interests of foreign nations will be seriously injured in two material respects. In the first place, the exemption will result in the cost of the working of the Canal being borne wholly by foreign-going vessels, and on such vessels, therefore, will fall the whole burden of raising the revenue necessary to cover the cost of working and maintaining the Canal. The possibility, therefore, of fixing the toll on such vessels at a lower figure than \$1.25 per ton, or of reducing the rate below that figure at some future time, will be considerably lessened by the exemption. In the second place, the exemption will, in the opinion of his Majesty's Government, be a violation of the equal treatment secured by the treaty, as it will put the "coastwise trade" in a preferential position as regards other shipping.

The despatch concludes:—

Knowing as I do full well the interest which this great undertaking has aroused in the New World and the emotion with which its opening is looked forward to by United States citizens, I wish to add before closing this despatch that it is only with great reluctance that His Majesty's Government have felt bound to raise objection on the ground of treaty rights to the provisions of the Act. Animated by an earnest desire to avoid points which might in any way prove embarrassing to the United States, his Majesty's Government have confined their objections within the narrowest possible limits, and have recognized in the fullest manner the right of the United States to control the Canal. They feel convinced that they may look with confidence to the Government of the United States to ensure that, in promoting the interests of United States shipping, nothing will be done to impair the safeguards guaranteed to British shipping by treaty.

AMERICAN VIEWS ON THE BRITISH PROTEST.

Fundamentally important though it be, there is an inclination in dealing with Sir Edward Grey's despatch to brush aside the "all nations" controversy in favour of consideration of the dues controversy in its more direct aspects. Nor is much attention given to the ethical side of the question implied by the comparison of the Clayton-Bulwer and Hay-Pauncefote Treaties.

Interest for the moment is concentrated in the prospects of a diplomatic settlement and not in the prospects of arbitration. In some quarters, indeed, it is felt that the British case, for all its moral justice, is weakened by the fineness of the distinction between the acknowledgment that the United States may give financial help to their vessels using the Canal which it is open to other nations to give, and the statement about those methods of subsidizing which are rather vaguely mentioned as discriminatory. It is, of course, recognized in certain quarters that what the distinction really means is that such financial help on the part of the United States should, to meet the British view, be a declared subsidy, and that the Canal as a neutral body cannot be used as an instrument for the private commercial policy of the United States. But at the same time it

is not believed that the United States—were their right to what appears to be rather comprehensive preferential policy finally recognized—would be averse from giving the guarantees implied by the distinction.

THE PANAMA CANAL ACT.

AMERICAN REPLY TO THE BRITISH PROTEST.

A Parliamentary paper [Cd. 6585] was issued last week giving the text of the reply of the Washington Government to the British despatch protesting against certain provisions of the Panama Canal Act.

The American Secretary of State says at the outset that his Government does not agree with the interpretation placed by Sir Edward Grey upon the Hay-Pauncefote Treaty, or upon the Clayton-Bulwer Treaty, "but, for reasons which will appear herein below, it is not deemed necessary at present to amplify or reiterate the views of this Government upon the meaning of those treaties."

The British objections, Mr. Knox declares, are, in the first place, about the Canal Act only, but that Act does not fix the tolls. He summarizes the matter in the following words:—

They (the objections) ignore the President's proclamation fixing the tolls, which puts at rest practically all of the supposititious injustice and inequality which Sir Edward Grey thinks might follow the administration of the Act, and concerning which he expresses so many and grave fears. Moreover, the gravamen of the complaint is not that the Canal Act will actually injure in its operation British shipping, or destroy rights claimed for such shipping under the Hay-Pauncefote Treaty, but that such injury or destruction may possibly be the effect thereof; and, further, and more particularly, Sir Edward Grey complains that the action of Congress in enacting the legislation under discussion foreshadows that Congress or the President may hereafter take some action which might be injurious to British shipping and destructive of its rights under the Treaty.

concerning this possible future injury it is only necessary to say that, in the absence of an allegation of actual or certainly impending injury, there appears nothing upon which to base a sound complaint concerning the infringement of rights claimed by Great Britain; (but) it may be remarked that it would, of course, be idle to contend that Congress has not the power, or that the President, properly authorized by Congress, may not have the power, to violate the terms of the Hay-Pauncefote Treaty in its aspect as a rule of municipal law. Obviously, however, the fact that Congress has the power to do something contrary to the welfare of British shipping, or that Congress has put, or may put, into the hands of the President the power to do something which may be contrary to the interests possessed by British shipping, affords no just cause for complaint. It is the improper exercise of a power, and not its possession, which alone can give rise to an international cause of action; or, to put it in terms of municipal law, it is not the possession of the power to trespass upon another's property which gives a right to action in trespassing, but only the actual exercise of that power in committing the act of trespass itself.

When, and if, complaint is made by Great Britain that the effect of the Act and the proclamation together will be to subject British vessels as a matter of fact to inequality of treatment, or to unjust and inequitable tolls, in conflict with the terms of the Hay-Pauncefote Treaty, the question will then be raised as to whether the United States is bound by that Treaty both to take into account and to collect tolls from American vessels, and also whether, under the obligations of that Treaty, British vessels are entitled to equality of treatment in all respects with the vessels of the United States. Until these objections rest upon something more substantial than mere possibility, it is not believed that they should be submitted to arbitration. Existence of an arbitration treaty does not create a right of action; it merely provides means of settlement to be resorted to only when other resources of diplomacy have failed. It is not now deemed necessary, therefore, to enter upon a discussion of the views entertained by Congress and by the President as to the meaning of the Hay-Pauncefote Treaty in relation to questions of fact which have not yet arisen, but may possibly

arise in the future in connexion with the administration of the Act under consideration.

It is recognised by this Government that the situation developed by the present discussion may require an examination by Great Britain into the facts above set forth as to the basis upon which the tolls fixed by the President's proclamation have been computed, and also into the regulations and restrictions circumscribing the coastwise trade of the United States, as well as into other facts bearing upon the situation, with the view of determining whether or not, as a matter of fact, under present conditions, there is any ground for claiming that the Act and proclamation actually subject British vessels to inequality of treatment or to unjust and inequitable tolls.

If it should be found as a result of such an examination on the part of Great Britain that a difference of opinion exists between the two Governments on any of the important questions of fact involved in this discussion, then a situation will have arisen which, in the opinion of this Government, could with advantage be dealt with by referring the controversy to a commission of inquiry for examination and report, in the manner provided for in the unratified Arbitration Treaty of the 3rd August, 1911, between the United States and Great Britain.

The necessity of inquiring into questions of fact in their relation to controversies under diplomatic discussion was contemplated by both parties in negotiating that Treaty, which provides for the institution, as occasion arises, of joint high commission of inquiry, to which, upon the request of either party, might be referred for impartial and conscientious investigation any controversy between them, the commission being authorised upon such reference "to examine into and report upon the particular questions or matters referred to it, for the purpose of facilitating the solution of disputes by elucidating the facts, and to define the issues presented by such questions, and also to include in its report such recommendations and conclusions as may be appropriate."

This proposal might be carried out, should occasion arise for adopting it, either under a special agreement, or under the unratified Arbitration Treaty above mentioned, if Great Britain is prepared to join in ratifying that Treaty, which the United States is prepared to do.

SOME FURTHER OBSERVATIONS UPON CANADIAN BANKS AND BANKING.

A COMPARISON OF THE BANKING ACTS OF CANADA AND THOSE OF OTHER COUNTRIES.

BY PETER RYAN, ESQ.

WHAT SOME FOREIGN BANKS PAY TO THEIR SEVERAL STATES FOR THEIR FRANCHISES.

The banks of the United States pay substantially for the privilege of issuing notes which are furnished by the Treasury of the Republic.

The United States Banks are not allowed to establish branches. Every Bank is a local Bank and not, as in Canada, used to bleed the rural districts white. Their directors are local men, who help build up local industries, merchants and farmers.

They are subjected to Government inspection without one moment's warning, and must shew up on demand.

The Banks of the United States have no combine rate of interest to depositors, nor do they try to control the Government. They would like to, but the people and Congress won't let them.

AMERICAN BANK INSPECTION AND CANADIAN BANK INSPECTION COMPARED.

The Canadian bankers object to Government inspection for obvious reasons, and the directors who are in the Senate and Commons will be very busy if any attempt is made to subject their institutions to examination except by their own officials.

If their business is done on the sound principles they claim they should welcome independent Government inspection; and if on unsound or immoral methods, the sooner depositors and the public know it the better. The real objection to Government inspection is believed to be the numerous "skeletons" in their cupboards.

WHY NOT THE STATE BE PAID FOR THE CURRENCY ISSUED?

If the Banks of the United States can pay, and do pay, for the very valuable franchise of issuing currency, why *cannot Canadian Banks* do so also?

In the United States Banks pay *direct tax* of one-half of one per cent. on their notes, which are backed by \$100 in gold for every \$90 of issued notes. The gold to redeem the currency is in Uncle Sam's vault, and he is responsible for it.

The Banks of the United States must buy their currency from the Treasury of the Republic by depositing gold at ten per cent. over par, or the gold bonds of the United States, which bear only two per cent. interest and issued especially for banks.

Nearly all the Saving Banks of New York pay interest at four per cent. per annum to depositors, therefore the Banks pay heavily to the public for issuing notes.

Direct and indirect, they pay about \$2.45 per cent. per annum for the privilege of issuing notes. The Canadian Banks pay *not one cent*, except the cost of the paper and the engraving, against which they get all the benefit of lost and destroyed bills, which in the United States inures to

The Banks of the United States lend money to farmers and manufacturers cheaper on the average than do the Canadian Banks. The Canadian Banks don't often lend to farmers, however good, and never when money is tight.

THE BANK OF BELGIUM AND ITS OBLIGATIONS TO THE STATE.

The Bank of Belgium pays the State for the privilege of issuing notes, does all the Government business free, discounts small notes as low as \$2, and at an average rate not higher than three and a half per cent. per annum. From its net earnings it *pays the State fully fifty per cent. more than it pays its shareholders in dividends*. The State appoints the President of the Bank and the Bank pays his salary. Truly *the Bank of Belgium does not own the Parliament and Government of Belgium*.

THE BANK OF NORWAY.

The Bank of Norway pays tax on its notes and half the Bank's profits from six to ten per cent., and all above ten per cent. is divided by the Bank getting one-fourth and the State three-fourths.

NOTE.—A share of Bank profits returning to the State is equally as just as the Gas Company of Toronto being obliged

to return all profits above ten per cent. to gas consumers by a reduction in the price of gas, and all increased amount of shares issued are sold by auction in small lots. No melon-cutting permitted.

THE BANK OF AUSTRIA-HUNGARY.

The Bank of Austria-Hungary pays heavy taxes on its notes in circulation, and the Empire claims *all profits over seven per cent. on the actual paid capital.*

NOTE.—The Toronto Street Railway Company returns to the Treasurer of Toronto fully one million dollars per annum for its franchise. Why don't the Banks of Canada pay to the Dominion Government a share of their enormous earnings which their franchises enable them to make?

THE BANK OF FRANCE.

The Bank of France, notwithstanding its great service in war and peace to the Republic, pays stamp duties and interest on its currency amounting to several million dollars per annum; loans permanently to the Government of France free of interest, nearly fifty million dollars, and does all the Government business without charge; also lends to the Government of France thousands of millions of francs at one and two per cent. interest. *It returns to the State three-fourths of its earnings over five per cent. and one-eighth of the entire charge on discounts.*

The discount rate, unlike Canadian Banks, *is alike to all.* In addition to the above conditions, and others too numerous to specify, it loans many million francs every year to farmers, through their agricultural societies, for purely agricultural purposes at *two per cent. per annum.* Is it any wonder that the farms of France are so productive, and that France is not alone the richest nation on earth, but the controller of the money markets of the world?

The Bank of France in no sense owns or controls the Government or people of France. The interest and well-doing of the people demands and receives from this great institution the first consideration. Hence French farming and manufacturing industries are amongst the most prosperous in the world. During the past thirteen years the rate of discount has only changed ten times *and has never exceeded four and a half per cent.*

Yet even the above conditions have not been considered sufficiently favourable to the State, for under the new law which came into effect on January 1st, 1912, the share of profits to the Government has been much increased and the Bank is obliged to lend to the Government, *free of interest, an additional one hundred million francs, and twenty million francs also free of interest or charge, in aid of new and desirable industries, as directed by the State.* Surely the Bank of France does not control the Government or the people of France.

THE BANKS OF ITALY, SICILY AND NAPLES.

The Banks of Italy, Sicily and Naples pay to the Government of Italy more than two and a half million dollars per annum as currency tax. *They are compelled to lend to the Government money, as required, at one and a half per cent interest.* They pay to the Government *one third of all profits from five to six per cent., and one-half of all above six per cent.* The Banks of Italy don't own the Government of Italy.

NOTE.—The Government of Ontario, with perfect justification, taxes tavern-keepers a substantial percentage on all the bar receipts over an amount which is supposed to represent the cost of doing business. This is the price of obtaining a public franchise of special value. Query: Have the Canadian Banks not a specially valuable franchise, and should they not be taxed as well as tavern-keepers? Let the Bank lobbyists explain why, and the Bank directors on the Banking Committees of the Senate and Commons stand up and answer.

THE BANK OF HOLLAND.

The Bank of Holland for its franchise loans to the State fifteen million florins, on which no interest is charged, does all Government business free, and apportions the profits as follows: 1st, to capital, three and a half per cent. as a first charge; 2nd, twenty per cent. of remainder to the Reserve, which must not exceed twenty-five per cent. of the paid-up cash capital; 3rd, three per cent. of residue to directors' fees, commission, etc.; 4th, of the remainder, one third to the shareholders and two-thirds to the State.

THE BANK OF SWITZERLAND.

The Bank of Switzerland, for the privilege of doing business, pays to the Republic thirty centimes per capita for the first fifteen years, after which eighty centimes per capita is levied, at which figure, if imposed on the Banks of Canada, would realize nearly one and a half million dollars per annum. The Rest or Reserve must never exceed thirty per cent. of the paid-up capital, and the profits are divided as follows: *four per cent. to the shareholders* and the residue to the Federal and Canton Governments in two-thirds and one-third, respectively. The thrifty and shrewd mountaineers have never bent their necks to the moneyed interests, but ever kept in view "the greatest good to the greatest number," and largely through their intelligent Bank Act take high rank as manufacturers of textile fabrics and machinery of all kinds, though there is not a pound of coal or iron mined within her gates. The Bank of Switzerland was not founded nor does it exist to make money for the favoured few, but for the good of the Republic.

THE IMPERIAL BANK OF GERMANY.

The Imperial Bank of Germany is allowed to pay its shareholders all the net profits up to three and a half per cent. From the surplus twenty per cent. is allowed to be set aside as a Reserve so long only as it does not exceed twenty-five per cent. of the actual paid-up capital. If there is any residue the shareholders get one-fourth and the State three-fourths; but no matter however great the earnings of the Bank be, *the shareholders must never receive more than six per cent. on the paid-up capital.*

The discount rate is *alike to the small and large borrowers*, and the Government of Germany watches over the interest of the farmers, manufacturers and traders. The President and Vice-President are the Chancellor of the German Empire and the Finance Minister of Prussia. Notwithstanding the exacting conditions imposed on the Bank the State receives annually from the Bank as its share of the profits about ten million dollars. In Germany the interest of the people has the first place, and the State is paid for the value of the franchise, which in Canada is a gift enterprise to the moneyed guilds.

The Imperial Bank of Germany has no monopoly in banking. It is in healthy competition with the Deutscher Bank, the Dresdner Bank, the Banks of Baden, Bavaria, Prussia, Saxony, and other Banks, all of whom have to pay their respective States for the right to do banking business. The Banks of Germany don't own the Germanic Empire or people.

THE BANK OF SPAIN.

The Bank of Spain, as one of the conditions of its charter, loans the Government about *thirty million dollars* in our currency, *free of interest*, pays ground tax, stamp duties, and *one-sixth of the entire earnings of the Bank*.

SCOTCH BANKS.

The people of Canada are frequently told that our banking system is based on the Scotch banking system. It may be in some features, but the Banks of Scotland, unlike Canadian Banks, pay 8s. 4d. per £100 tax on the issued currency, which is nearly one-half of one per cent., and the Scotch Banks pay a special business tax of \$300 on every head office, \$150 on every branch office, and about \$16,000 per annum per bank for stamp duty. Altogether the Scotch Banks pay to the Crown \$500,000 per annum for what the Banks of Canada get for nothing.

The Banks of Scotland establish a weekly uniform rate of discount. The stock broker and the exploiter of foreign enterprises are said to pay the same rate charged to the farmers, merchants and manufacturers. There is no double liability on the shareholders, but there is greater security to the Bank creditors, for several of the Banks are unlimited liability to every shareholder, and the remainder of the Scotch Banks have only twenty per cent. of the subscribed capital paid up. *There is no limit to the liability for the redemption of the notes.* The Scotch Banks specially aid farmers and cattle and sheep raisers before harvest and shearing time by discounting joint notes at a rate never exceeding one and one-half per cent. above the Bank of England rate, and only charge interest on the daily debit balance.

In Canada the farmer is the first man to feel the squeeze and the last to receive assistance, and then only after the demands of the large centres have been served.

THE BANK OF ENGLAND.

The Bank of England has to pay interest on all its issued currency over £14,000,000, but for this privilege it pays the Government all the net profit from any excess circulation and which is said to amount to nearly a million dollars per annum. It also pays annually \$300,000 in stamp taxes, gives the public clean bills, and loans the Government of England permanently nearly three hundred million dollars at two and a half per cent. interest. For the past forty years no new Bank of England has been granted the right to issue currency.

The laws governing Bank taxation and refunds in nearly all the important countries in the world have been quoted, briefly, it is true, but sufficient to arrest the attention of Parliament to the justice of amendments to the Canadian Bank Act in the direction of limiting the powers of Banks and a refund of a share of the profits to the people from whom they are being taken; so, also, as a matter of protection to the entire community, a thorough and independent system of Bank inspection should be established and rigorously enforced. The Government of Canada should also have a director on every Bank Board, but paid by the Bank, but no owner of Bank shares should be qualified to hold such office.

IS UNLAWFUL AND EXTORTIONATE INTEREST CHARGED?

The Canadian Bank Act limits the rate of discount and interest chargeable to *seven* per cent. per annum.

Is this law observed? If not, any excess charged is theft. If seven per cent. is not enough change the law.

Why not test the Banks by demanding an affidavit with every Bank return to the Finance Minister shewing the *maximum* rate of interest charged in their entire branch system from month to month. So also there should be published a statement shewing the amount, if any, received by Banks or Bank officials by way of commission or otherwise on insurance policies taken out to protect Banks and charged to Bank borrowers.

This commission graft on insurance policies is *rankly dishonest*, whether the profit goes into the coffers of the Bank or into the pockets of the Bank officer. Every Bank agent should send an affidavit on this feature of Canadian banking practice with every monthly report.

The maximum rate of interest Canadian Banks were allowed to charge was formerly six per cent. A former indulgent (or worse) Parliament made the maximum rate seven per cent. Coupled with untaxed currency and the combine rate of interest to depositors, it is altogether too high; but whether or not, the law should not be violated except under severe penalties.

Is the Parliament of Canada held in bondage by less than a dozen High Priests of Finance? Its independence and sense of justice will be tested when the Bank Act comes before it. Watch how the Bank directors in the Commons and Senate will work together in harmony.

LEGALIZED BANK ROBBERY.

The Banks of Canada, under section 88 of the Banking Act, are empowered to take mortgages against all the goods and chattels of manufacturers and others, which need not be registered. Such mortgages are held by the Banks unknown to the confiding creditors, and when trouble comes the Bank swoops down on the bankrupt estate, and usually claims all there is and leaves the ordinary creditor out in the cold.

The Banks are now going to permit parliament to extend this law to farm produce and live stock when they wish, which won't be often.

If such mortgages between man and man must be registered to protect the mortgagee, why does the Bank have the special privilege of keeping their mortgages in full force without registering? This was given to enable Banks to *rob confiding people* selling their goods and produce to *Bankrupt* manufacturers and wholesale dealers, which, as soon as delivered into the sheds or factories or stores of the Banks' debtors, *become forthwith the property of the Bank as the secret mortgagee*.

Will the Parliament of Canada wipe it out or extend it? It depends on the power and influence of the moneyed cor-

porations over the Parliament and Government of Canada.
"We will see what we shall see."

BANK MERGERS.

The process of amalgamation by the Canadian Banks must in a short time complete the power of the moneyed corporations over the Parliaments and Governments of Canada.

The fewer the number of Banks the greater the power centred in a small number of men and the sure and certain curtailment of popular freedom. We have now one-third less Banks than we had twenty years ago.

Bank amalgamations should not be lawful except by a *two-thirds vote of both the Senate and Commons*, accompanied by affidavits of both General-Managers and Presidents setting forth the amount of commissions or profits paid to the promoter and to whom, together with all other considerations given to the directors and officials of the absorbed Bank.

A Parliamentary enquiry into the recent Bank amalgamation might shew something of interest to the public.

Every Bank merger makes for a fewer number of men controlling the capital of Canada. The reign of the "man on horseback" is preferable to the rule of the financial High Priests, and who are able in most cases to enrich or impoverish at will.

THE TRUST COMPANY MACHINE.

Trust Companies, which are adjuncts to the large Canadian Banks, should be enquired into. They are a recent discovery how to grow rich by using the Bank depositors' money. The directors of the Bank and its Trust Company are the same, and the machinery operated to enable Bank directors to make money for themselves by methods not in keeping with high morality.

There should be a complete divorce of the Trust Company and Banking business, and no Bank director, or Bank officer or agent should be eligible to act as Trust Company director.

The existing order of things tends to graft on the part of Bank directors who are running Trust Companies for their own profit.

THE MARRIAGE REGULATION CONTRARY TO MORALS AND THE PUBLIC INTEREST.

The pious and unctuous Directors of most Canadian Banks don't allow their clerks to marry except they are in receipt of at least three times the average wages paid mechanics—a sure method of discouraging the command of the Almighty, though most of Bank directors are much in evidence in church gatherings. But by way of excuse for this monstrous regulation against marriage it may be urged that most of the Bank directors are at a time of life when they have impressed on them that “all is vanity and vexation of spirit.” Let the Banks pay their juniors fair living salaries and encourage marriage. The earnings of the Banks can afford reasonable wages to all their employees instead of the existing skimpy remuneration.

The Banks are now importing clerks from Britain, owing to the meagre salaries paid by the Banks of Canada. The ordinary Trade Unions would not meekly submit to this method of keeping wages down.

THE VALUE OF CANADIAN UNTAXED CURRENCY.

Over one hundred million dollars are permanently loaned by the State to the Canadian Banks by the operation of the currency law, with the increasing wealth and population, and the increasing Bank capital it will soon reach three hundred millions, in illustration of which it may be stated that the amount of Bank Currency in circulation in 1891 was \$35,000,000 To-day it is about three times this amount.

Sir Francis Hincks claimed “that as the State created the credit, the State should share in the profit.” This is equally true to-day, but will the Canadian Parliament act on this advice or respond as heretofore to the crack of the party whips or manifest sufficient personal and party independence to guard the interests of the common people?

The *untaxed currency* issued by the Canadian Banks represents one-sixth the value of the entire agricultural productions of Canada, and the labour and sweat of one farmer out of every six, together with their wives, families and hired help.

The *untaxed currency* in circulation by the Banks of Canada represents an amount in excess of the entire Drink Bill of the Dominion.

The *untaxed currency* in circulation by the Canadian Banks represents the value of every gallon of milk, and every pound of butter and cheese, produced in the Dominion, from ocean to ocean.

Just think what it means to give a few rich and influential men the manipulation of the money represented here and for the use of which not one cent is paid to the State.

The *untaxed currency* in circulation by the Canadian Banks represents the annual value of all the minerals produced in Canada, including gold, silver, nickel, corundum, copper, lead, iron, coal, clay, cement, petroleum, asbestos, mica and stone.

The *untaxed currency* of the Banks of Canada represents more than the stumpage value of all the timber cut in the Province of Ontario for the last twenty years.

The *untaxed currency* of the Banks of Canada represents the value of the entire shipments to Great Britain of wheat, oats, barley, rye, flour and grain products of all kinds for four years.

The *untaxed currency* of the Banks of Canada represents the entire value of five years' catch of all the fisheries of Canada, deep sea, river, gulf and lakes combined.

The *untaxed currency* of the Banks of Canada represents the entire value of everything produced by every farmer in the Province of Quebec. More than the value of everything produced by every farmer in Manitoba, and much more than the value of the entire product of every farmer in Prince Edward Island, Nova Scotia, New Brunswick and Alberta combined.

Shall this enormous and valuable privilege continue in order that the rich may become richer? And is the Parliament of Canada to continue as the consenting party to all the demands of the moneyed guilds and their deals with governments, where the power of wealth is so manifest as to astonish reflecting minds?

PETER RYAN.

CONDITIONS GOVERNING THE EMPLOYMENT OF BANK CLERKS.

(*The Labour Gazette.*)

The following statement is based on an inquiry at Ottawa into the general conditions governing the employment of bank clerks throughout Canada:

Minimum age of entry.—17 years.

Qualifications.—Good business education, respectable parentage, unblemished character, and ability to furnish bondsmen. In some cases, however, banks have Mutual Bonding Societies, the clerk paying a fee in proportion to his salary, which is refunded on his leaving their service, with interest.

Wages.—There is no fixed rule among bank corporations as to wages paid to their clerks for services rendered, in many cases remuneration being dependent upon the ability of the individual.

As a rule clerks are engaged first as runners, at a minimum wage of \$250 per annum; exception, however, is sometimes made when the clerk boards out, his salary being \$350.

The usual raise of salary per annum is \$100, but sometimes a larger increase is given when the clerk shews exceptional ability and interest in his work.

The average salary of a teller in cities like Toronto, Montreal and Ottawa is in the neighbourhood of \$900; in smaller cities and towns \$700, and in villages \$450-\$500.

An accountant's average salary in cities is about \$1,650; in smaller cities and towns \$1,000-\$1,200, and in villages \$700-\$900.

Business hours.—The official hours of work are generally from 10 a.m. till 3 p.m., except Saturdays, when banks close to the public at 12 p.m. Clerks, however, usually work till considerably later than the closing hour, and are called upon to work, especially at the end of the month and when the inspector is visiting the bank, sometimes till 10 p.m., and later, no extra remuneration being allowed.

Restrictions.—The rule concerning marriage is strict, no clerk being allowed to marry till he earns \$1,000 per annum; in some cases the sum is fixed at \$1,500. Clerks are required to provide their own lunch and are not allowed to

leave the bank in business hours except under exceptional circumstances. In some banks a superannuation fund exists, and clerks are required to subscribe thereto, this being deducted from their salary.

Vacations.—All statutory holidays are taken, and generally a vacation of two weeks is allowed by the manager of the bank.

General remarks.—The above schedule does not apply to bank managers, but enquiry shews that their remuneration is better graded than their juniors. The salary in large cities averages about \$3,000, in smaller cities and towns \$2,000-\$3,000, and in villages \$1,200-\$1,600.

Often a clerk of exceptional merit can within four or five years command a salary of \$900; on the other hand it usually takes five years to reach a salary of \$800.

Tellers are required to make good all shortages that occur, surpluses being retained by the bank.

SOME EARLY LEGISLATION AND LEGISLATORS IN UPPER CANADA.

BY THE HONOURABLE MR. JUSTICE RIDDELL, L.H.D.,
LL.D. &c.

Second Paper.

The second session of the first Parliament met at Newark, Friday, 31st May, 1793, the Legislative Councillors present being Osgoode, Russell, Grant, Cartwright, Baby and Hamilton. The session lasted till Tuesday, 9th July, and was not unfruitful.

The first chapter provided for the better regulation of the militia of the Province. Before this time a regulation passed at Quebec in 1777, had been in force, but it was now repealed; it had, indeed, given great offence even in Quebec, long before. It had provided for compulsory service on very insufficient pay, for payment at fixed rates for labour rendered, etc.; and generally had all the defects and faults and few of the advantages of a system of *Corvée*. It was petitioned against; and the attempts of Hamilton, the Lieutenant-Governor to enact a new militia law led to his recall in 1785.

War was in 1793 going on between France and England; the people of the United States (speaking generally) were strongly in favour of France, and although Washington issued a proclamation of neutrality, the people and the Government of Upper Canada lived in constant dread of an invasion from the south, a dread that was afterwards shewn to be fully justified by the wicked and wanton war declared by the United States in 1812. This war it is now conceded had for its main purpose the acquisition of Canada.

The speech from the throne by Simcoe recommended an early modelling of a militia bill on account of the war with France. The Houses did not delay, and by July 2nd they had agreed upon legislation.

This authorized the appointment of a Lieutenant in each county and riding with power to call out, arm, array and train militia once a year—each Lieutenant to appoint a Deputy-Lieutenant and “a sufficient number of Colonels, Lieutenant-Colonels, Majors and other officers” to do the training (we have seldom been lacking in colonels)—the militia to be composed of all male inhabitants from 16 to 50 years of age, and in case of emergency to be liable to be called on to serve in any part of the Province. Provision was made for division into regiments, companies, etc. Section 22 excused “the persons called Quakers, Mennonists and Tunkers” from serving, but they were to pay to the Lieutenant, each, per annum, 20 shillings in times of peace and £5 in time of actual invasion or insurrection. Special legislations for these classes of people will be found more than once in subsequent years.

The second chapter was the beginning of our municipal system, providing as it did for the election of parish or town officers. It authorized the inhabitant householders of any parish, town or township, reputed township or place to elect a parish or town clerk, assessors, collectors, overseers of highways, pound-keepers, town-wardens or church-wardens, high constables, etc.

Chapter three was the first of our assessment acts, and it also provided “for the payment of wages to the Members of the House of Assembly.” Frequently we hear it said of Members of Parliament that they are the servants of the people; but we do not nowadays hear of them being paid “wages”—the sum paid them is dignified by the name “indemnity.” But the blunt plebeian word was that used in

England so long as the practice itself lasted. From the earliest times payment was made to Knights of the Shire and Burgesses; and in 1323, by Statute of 16 Edward II., the wages were fixed at four shillings per day for a Knight and two for a Burgess or citizen. These payments were made by the constituency, and continued regularly until the end of the reign of Henry VIII. When the time came to incorporate Wales with England, the Act of Parliament providing for representation of Wales, passed in 1535-6, 27 Henry VIII., ch. 26, provided that towns should pay wages to their representatives, and the second Act, passed in 1543-4, 34 and 35 Henry VIII., ch. 26, had similar provisions. And when the universities received the right to send representatives to Parliament, it was provided that the burgesses were to be at the charge and costs of the Chancellor, masters and scholars, and there is ample evidence that the members for the University of Cambridge in 1603-4, nearly if not quite the first to represent a university, were allowed five shillings per day for their expenses.

The practice gradually died out. The oft-repeated story that the well-known Andrew Marvell, who sat for Hull in the reign of Charles II., was the last member of the Commons to receive wages, is not true, for in 1681, three years after Marvell's death, King, who had been M.P. for Harwich, obtained a writ from the Chancellor for his expenses as member of the House. But so far as appears it may be considered that Marvell was the last to receive a regular salary in this way. Lord Campbell seems to think that the writ never was abolished, but could be claimed as of right. However that may be, the payment of wages to members died out in England more than two centuries ago, and they served without remuneration until the other day.

Many looked upon it as part of the constitution that the Commons should serve at their own expense, but it is not reported that any very dire calamity has followed the new measure.

It is to be noted that both in England and in Canada the present method is payment by the country; but as we shall see, the ancient method in England was followed in Upper Canada at first, and the constituencies were liable for the wages.

In the Irish Parliament, the practice of paying members also prevailed, the freeholders being assessed and the money

collected by the Sheriff; in 1666 a Bill passed the Irish Commons abolishing wages for its members entirely; but this was rejected by the Irish House of Lords, and the old law continued until the Union in 1800.

In Scotland as early as 1587 there was statutory provision for wages to be paid to members by the freeholders; further legislation took place in 1648 and 1661. The "Commissioners" or members for shires were by the last Act to receive five pounds Scots (i.e., 8 shillings and 4 pence sterling) per day. These wages were not paid after the Union with England in 1707, the last Act providing for them being in 1690; when, seventeen years afterwards, the Union came about, all wages and allowances from constituencies were allowed to lapse.

However, the "wages" given in 1793 in Upper Canada did not alarm by excess. Section 30, after reciting that "it was the ancient usage of England for the several members representing the counties, cities and boroughs therein to receive wages for their attendance in Parliament," enacted that every member of the House of Assembly should be entitled to demand from the justices of the peace of the district in which his riding was situated, a sum not exceeding 10 shillings per day (i.e., \$2) for each day he had been engaged in attendance on the House, and been necessarily absent from his house, the amounts to be paid out of the rates. This was slightly amended ten years after by (1803, 43 Geo. III. ch. 11.¹

¹ That this provision for the wages of members of the popular House was not a dead letter is seen from the records at *Osgoode Hall*. For example: In Michaelmas Term, 50 Geo. III. Nov. 1810, 1818, in the Court of King's Bench (*proca.* Powell, C.J., Campbell and Boulton, JJ.), a *mandamus nisi* was issued to the justices of Gore, requiring them to issue an order to the treasurer of the district for the payment to Richard Hall, Esq., a member of the Commons House of Assembly of Upper Canada, of the sum of thirty pounds, being the amount of his wages for sixty days' attendance at the last session of the Provincial Legislature, out of the moneys which may come into his hands under and by virtue of any Act of the Provincial Parliament. And a similar order to pay James Durand, Esq., Member of the Assembly.

These were made absolute April 17th, 1819.

Other instances may be of interest:—

"At a meeting of the Quarter Sessions for the District of Newcastle, holden at Haldimand, April 10th, 1804, at which were present Timothy Thompson, Benjamin Richardson, Ann Burnham, James Keeler, Joel Merriman, John Spencer, Leonard Soper, Asa Weller, Elias Jones and Richard Lovekin, Esquires, the following order was made: "The Magistrates in Quarter Sessions assembled in the district of Newcastle, the 10th of April, 1804, order that the sum of forty-five pounds, ten shillings, be collected in the county of New-

thumberland to compensate David M. Rogers for services as Member of the House of Assembly for the years 1801, 1802, 1803 and 1804.

"(Sgd.) Tim'y Thompson,
"Chairman."

And on April 9th, 1805, this order was made: "Ordered that the sum of nine pounds, ten shillings, be collected in the county of Northumberland for the wages of David Macgregor Rogers, Esquire, Member of the House of Assembly, representing the counties of Hastings and Northumberland, for his services during the first Session of the Fourth Parliament.

"April Sessions, Haldimand, 9th April, 1805.

"Alex. Chisholm,
"Chairman."

On April 8th, 1806, the following: "Ordered that the sum of nine shillings and five pence halfpenny, be allowed in abatement to Benjamin Eging, collector of the rates for the township of Haldimand, for the year 1806, for the rates of persons not living in the township. The Clerk of the Peace presented the following Assessment Rolls to the Magistrates for the townships of Murray, Cramahe, Haldimand, Hamilton, Hope, Darlington. Ordered that the clerk transmit a copy of the said assessments agreeable to law. Ordered that the sum of five pounds, fifteen shillings, Halifax currency, be collected for the payment of the wages of the Member of the House of Assembly for the second Session of the Fourth Parliament in the county of Northumberland.

"(Sgd.) Benjamin Richardson,
"Chairman."

On April 14th, 1807, the following: "Ordered that the sum of eleven pounds, five shillings, be collected for the payment of the wages of the Member of Assembly representing the counties of Hastings and Northumberland, for the third Session of the Fourth Provincial Parliament, being the proportion of Northumberland."

David M. Rogers was also Clerk of the Peace; he lived for a time in Prince Edward county and then removed to Grafton, Northumberland county. He represented his riding from 1796 to 1824, with the exception of one Parliament, and was active in military matters (as his descendants have been ever since). He became Registrar of Deeds for the united counties of Northumberland and Durham, and Judge of the District Court of Newcastle District: he died in 1824, aged 52.

The Act was, however, interpreted with some strictness. When the Act of (1820), 60 Geo. III., ch. 2, authorized representation for towns in which the Quarter Sessions were held, and which had a population of one thousand, and the town of Niagara sent Edward McBride as a member to the Legislative Assembly, the Court held, that he was not entitled to wages: *The King ex rel. Edward McBride, Esquire, M.P., against the Justices of the District of Niagara* (1826). Tay., 542. Members for towns had to serve without wages till 1835, 5 Wm. IV., ch. 6.

Chapter four provided for laying out and repairing highways by the agency of Commissioners or overseers, the beginning of the wretched plan of leaving the care of highways to local authority.

Chapter five was of very great public importance. Before the conquest in 1759-60, of course, the Roman Catholic religion was practically universal in Canada, and there was no trouble in procuring the solemnization of marriage. Even after the conquest and until the influx from the United States, Protestants were few in number, and practically all

lived in places of some importance like Quebec or Montreal, and a Protestant clergyman was there available. If a Protestant married in a country place it was to a "Canadienne," and her priest was good enough. But with the immigration into Upper Canada in considerable numbers of a country population, many of them Protestants, the situation was altered. By the law of England only a clergyman of the Church of England could perform the ceremony, and these were scarce: according to a report made in 1792 by Mr. Cartwright, Legislative Councillor, there were none in the Eastern District, only two in the Midland, one in the Home and none in the Western. There were a few Presbyterian, Lutheran and Methodist ministers, and some Roman Catholic priests; but these were not qualified. Marriages had, however, been solemnized by these and in some cases even by laymen; and some relief was urgently needed. A Bill was introduced in the Council by Cartwright, which, with some amendments, became law.

This validated all marriages theretofore contracted between persons "not being under any canonical disqualification to contract matrimony," who publicly contracted before any magistrate or commanding officer of a post, or adjutant or surgeon² of a regiment acting as chaplain," or any other

² It seems to have been not unusual for a surgeon to tie the matrimonial knot, and it is not at all unlikely that the following instance accounts for the mention of them in the Act. Captain James Mathew Hamilton, of the 5th Northumberland Regiment of Foot, when stationed at Mackinac, married Louisa, daughter of Dr. David Mitchell, Surgeon-General to the Indian Department, who performed the ceremony, as there was no clergymen of any denomination in that part of the country. The young couple were afterwards, *ex abundanti cautela*, remarried in 1792 by the Rev. Robert Addison, at Niagara. The entry in the marriage registrar of St. Mark's Church reads: "August 1792, Captain James Hamilton to Louisa Mitchell, his wife. They had been married by some commanding officer or magistrate, and thought it more decent to have the first repeated." The register was Mr. Addison's private book, but became the register of St. Mark's Church, Niagara, when that church was opened in 1809. Captain and Mrs. Hamilton were friends of Lieutenant-Governor and Mrs. Simcoe.

person in any public office of employment." For the future and until there should be five parsons of the Church of England in any one district, a J.P. might solemnize the marriage, using the form of the Church of England. It was of course quite too much to expect in the then existing state of religious toleration that any parson or minister of any other church or sect should receive such authority. The Lieutenant-Governor, Simcoe, indeed wrote to Dundas expressing his astonish-

ment that it had even been proposed to give such power to ministers of other denominations. At all events this proposition had to be abandoned. The Lieutenant-Governor did not like the Act which was passed, but public opinion was too strong for him and he assented to the Bill. Simcoe was most anxious for the establishment of the Church of England in Upper Canada, and bent all his energies toward that end.

The provisions of the bill were wholly unsatisfactory to many of the settlers. Some were Presbyterians who had come from Scotland, where their church was established and where Episcopalians were the dissenters; others were Lutherans whose church was established in parts of Germany. Many had come from the colonies to the south without an established church at all; not a few were members of the ancient Church of Rome, which had been the established Church in Canada till a few years before. None of these could see why their clergy were not quite as good as those of the Church of England. Petitions were signed and presented to the Lieutenant-Governor for a repeal of this marriage Act of 1793. These he treated with lofty scorn. He said that he thought it proper to say that he looked upon the petition as the product of a wicked head and a disloyal heart; but at length in 1796 an Act was passed, 38 Geo. III. ch. 4, making it lawful for a minister or clergyman of any congregation or religious community professing to be members of the Church of Scotland, or Lutherans, or Calvinists, to celebrate the ceremony of marriage for members of their own congregation or religious community, upon the minister procuring a proper certificate from the Quarter Sessions. Similar marriages in the past were also validated. This was so little to the taste of the Lieutenant-Governor that he reserved the Bill for His Majesty's pleasure. The royal assent was given Dec. 29, 1798, and the Bill became law. This made the trouble if anything more acute. So long as one Church had the monopoly it was not so bad, but when four participated, all those who were excluded insistently demanded the reason why.

The agitation was at length successful. In 1830, by the Act of 11 Geo. IV., ch. 36, the power of celebrating marriages was given to clergymen and ministers of the Church of Scotland, Lutherans, Presbyterians, Congregationalists, Baptists, Independents, Methodists, Menonists, Tunkers or Moravians,

offence, though afterwards made a subject of the Governor's clemency, for his known loyalty."

"Sawyer," was Rev. Joseph Sawyer, who became Presiding Elder of the Upper Canada District of the Methodist Episcopal Church in 1808, having then been a missionary for fourteen years.

"Mr. Ryan," was Rev. Henry Ryan, of great fame in the same Connexion, but who afterwards was a prominent leader in the division which took place in 1828-9, resulting in the formation of the Canadian Wesleyan Methodist Church.

I have not been able to verify the statements made as to these three ministers: there is no doubt, however, that ministers of all denominations considered it a part of their clerical functions to perform the marriage ceremony, and resented the ban put upon such act by the law.

In 1857, by the Act 20 Vic. ch. 66, the power of celebrating marriages was given to ministers and clergymen of every religious denomination in Upper Canada; in 1896, by 59 Vict., ch. 39, also to any elder, evangelist or missionary of the "Congregation of God" or "Of Christ," i.e., "Disciples of Christ," and also to a Commissioner or Staff Officer of the Salvation Army. Quakers are specially provided for.*

* There was no dearth of denominations in 1830, when the former Act was passed.

William Lyon Mackenzie, in the Introduction to his "Sketches of Canada and the United States," 1833, says:—

"There is . . . variety enough, if we include the Canadas. Within a square of 400 miles may be found the professors of 100 religions, creeds and systems, from the Menonist, Tunkard, and Child of Peace of Upper Canada, to the Hopkinsian, the Chrystian and Universalist across the Niagara."

The Children of Peace consisted of thirty or forty families in or near the village of Hope, in the township of East Gwillimbury, about 35 miles from York, and 4½ miles from Newmarket. David Wilson was their leader, but they had no written creed.

At an election at Niagara Falls, for the county of Lincoln, July 26th, 1824, Mackenzie says, p. 89: "There were Christians and Heathens, Menonites and Tunkards, Quakers and Universalists. Presbyterians and Baptists, Roman Catholics and American Methodists; there were Frenchmen and Yankees, Irishmen and Mulattoes, Scotchmen and Indians, Englishmen, Canadians, Americans and Negroes, Dutchmen and Germans, Welshmen and Swedes, Highlanders and Lowlanders."

The number of persons with this authority is fairly large, but no one is justified in getting up a little denomination of his own, and claiming the power to celebrate the marriage ceremony just because he is the minister of it. One Robert Brown tried that; he was the minister of a congregation known as "The First Christian Chinese Church, Toronto," and as such solemnized marriages. The Judge of the County Court of Toronto convicted him of the crime of unlawfully performing the marriage ceremony and the Court of Appeal affirmed the conviction: *Rex v. Brown* (1908), 17 O. L. R. 197.

Returning now to the Legislation of 1793.

Chapter 6 fixed the times and places of holding the Quarter Sessions in each District—in the Eastern District at New Johnstown and Cornwall, in the Midland at Adolphustown and Kingston, in the Home at Newark and in the Western at Detroit—also a Court of Special Sessions at Michilimackinac. Detroit was considered as part of Canada till 1796, and was governed accordingly—Michilimackinac was given up about the same time.

Chapter 7 is a most creditable piece of legislation. It practically abolished slavery in the Province, repealed for Upper Canada, 30 Geo. III., ch. 27, authorizing the importation of slaves into a colony. All negroes then slaves continued to be slaves, children of female slaves born after the Act served the master until the age of 25 years and then became free.

It was the Lieutenant-Governor who was responsible for pressing this legislation, though Chief Justice Osgoode and Solicitor-General Grey also deserve credit. It was by no means popular, on account of scarcity of labour; and the old story of Canaan serving his brethren, Gen. x., 25, was made to do duty over and over again. But "the power of the Crown" was then something to be afraid of, and Simcoe got his wish.

As I have said, Upper Canada had reason to be proud of her record in respect of slavery. The number of negro slaves in the Province was not very large absolutely; but in comparison with the number of free settlers it was not insignificant; many had been captured by the Indians in their invasions into United States territory and sold to Canadians at a small price, and their labour was very valuable.

In the case of the negro *Sommerset*, to be found in 20 Howell's State Trials, 29, the Court of King's Bench in 1772 had unanimously decided that as soon as a slave set his foot upon the soil of the British Isles he became free. Cowper in *The Task*, in 1785, sang:—

"Slaves cannot breathe in England; if their lungs
Receive our air, that moment they are free;
They touch our country and their shackles fall."

But that was the mother country; in the Colonies the curse of negro slavery prevailed to an extent limited only by the opportunity of obtaining negroes and the supposed need for their labour. Wilberforce had only in 1787 taken up the cause

—which had been a favourite for many years among the Quakers—of the abolition of the slave trade; but as yet no British Colony had spoken and Upper Canada led the way. She had been indeed preceded in 1792, May 6, by Denmark, but she led the British Colonies and all other nations in abolishing this infamous traffic. It was not till 1807 that it was forbidden for all the British Dominions, and not till 1833 was the Act passed abolishing slavery itself. August, 1838, saw the end of slavery under the Union Jack.

Chapter 8 established a Court of Probate in the Province and a Surrogate Court in each District. The Governor, Lieutenant-Governor or Administrator was to preside in the Court of Probate, and a Commissioner in each Surrogate Court. An appeal lay from the Surrogate Court to the Court of Probate.

This system existed till 1858. In that year, by 22 Vic. ch. 93, the Court of Probate was abolished, a Surrogate Court for each county organized with a Judge with the same authority as a Judge of a County Court, and 33 Geo. III. ch. 8, was formally repealed. Our present system is substantially that of 22 Vic. ch. 93.

By chapter 9 the Lieutenant-Governor was authorized to appoint three Commissioners to consult and agree with an equal number from Lower Canada as to duties to be imposed in the passing of goods from one Province to another. This may be passed over for the time.

Chapter 10 provided for the payment of officers of the two houses. Chapter 11 for the payment of a bounty for killing bears and wolves, 10 shillings for a bear and 20 shillings for a wolf, but this was not to extend to the Western District nor was any Indian to receive any reward for such killing.

Chapter 12 provided for the appointment by the Governor of returning officers.

Chapter 13 provided for salaries of officers of the two Houses and for contingent expenses. This is the form but the substance is rather different. By an Act of the Imperial Parliament in 1774, it had been provided that a duty of £1 16s. sterling should be paid for every license in the Province of Quebec for keeping a house of public entertainment or for retaining wine, brandy, rum or other spirituous liquor within the Province. The matter of duty upon wine and liquor brought into the Province had been up in the first session, but nothing came of the discussion. It passed the

Assembly October 4th. 1792, but received the three months' hoist in the Council October 8th.

In 1793 the Committee of Ways and Means in the Assembly reported in favour of a retail license fee of £2 per annum, and a bill was introduced accordingly and was sent up to the Council July 2nd, 1793; and this bill, after some opposition, was passed by that body. As finally passed it imposed a further license fee (in addition to the former of £1 16s.) of 20 shillings for each retail license, but this was not to extend beyond April 5th, 1797. The Receiver-General was allowed to retain 3 per cent. for himself of all money raised by this method.

During this session Peter Van Alstine, already mentioned, took the necessary oath, on the second day of the session. The day following it was ordered that such Acts as had passed or should pass the Legislature should be translated into French for the benefit of the inhabitants of the Western District and other French settlers who might come to reside within the Province, and A. Macdonell, Esquire, Clerk of the House, was employed as a French translator for this and other purposes of the House. Thus early we meet bilingualism.

A Bill to establish two annual fairs at New Johnstown did not pass; and the same fate met a proposed "Bill to relieve the inhabitants of the Western District from the necessity of bolting the grain they grind at their mills for toll."

The House was not unmindful of the privileges attached to the position of Member of Parliament. We find on Monday, 17th June, this resolution carried: "That the Speaker do inform W. B. Sheehan, Esquire, Sheriff of this district, that the House entertain a strong sense of the impropriety of his conduct towards a member of this House in having served a Writ of Capias upon the said member contrary to his privilege, and that the House has only dispensed with the necessity of bringing him to their bar to be further dealt with from a conviction that want of reflection and not contempt made him guilty of an infringement upon the privileges of the House."

This was, no doubt, the ordinary common law writ of *capias ad respondendum*; the defendant was not actually arrested on it, but was simply required to appear and put in common bail, i.e., formal bail; there were some cases in

which he might be arrested or compelled to put in special bail, *i.e.*, real and substantial bail.

Naturally his power of paying a debt was increased by being put behind the bars. All the learning—or most of it—on this subject to be found in Petersdorff and Tidd (Uriah Heep's favourite author), is now fortunately effete.

That the members of the Upper Canada House had the same privilege from arrest as a member of the Imperial House of Commons is certain—and that not only during the sittings of the House, but for forty days before and forty days after: *Reg. v. Gamble and Boulton* (1832), 9 U. C. R. 546, and several other cases down to *Cox v. Prior* (1899), 18 P. R. 492. Accordingly the sheriff had reason to consider himself lucky in escaping the fate of others who had been guilty of somewhat similar acts.

Upon the first day of the first Parliament of James I. in 1603, a complaint was made that Sir Thomas Shirley, who had been elected a member of the House of Commons, was arrested four days before the sitting of the Parliament and imprisoned in the fleet. A Writ of Habeas Corpus was issued and he was discharged. Precedents were looked unto and the plaintiff at whose suit and the sergeant by whom the arrest was made were sent to the Tower. The Warden of the Fleet, who had persisted in refusing to obey the writ of Habeas Corpus and deliver up his prisoner, was ordered to be committed "to the place called the Dungeon or Little-Ease in the Tower." Afterwards "delivering his prisoner" and "upon his knees confessing his error and presumption and professing he was unfeignedly sorry, the Speaker pronounced his pardon and discharge, paying ordinary fees to the clerk and the sergeant." And in February, 1606, an attorney who had procured the arrest of Mr. James, a member of the House of Commons, and the officer who had arrested him, were "for their contempt committed to the custody of the sergeant for a month, which judgment was pronounced against them kneeling at the bar, by Mr. Speaker."

It is to be hoped that Sheriff Sheehan was duly grateful for the clemency shewn him.

On Monday, 8th July, the House waited upon the Lieutenant-Governor with their address to His Majesty, expressing their horror and abhorrence of "the sacrilegious murder in France," and hoping "that a conduct so baneful to every precept of Religion and Law may serve to rivet the loyalty and

attachment of our fellow-subjects, as it has ours, to the best of Kings and of constitutions the most excellent." Louis XVI. had been executed the January before. This was "the sacrilegious number," sacrilegious because Louis was King by Divine Right—and notwithstanding that his right to the Crown was statutory, the doctrine of Divine Right was dear to George III. It was, of course, George III. who was the best of Kings,⁶ and the constitution as it then existed unre-

⁶ Wraxall tells us that it was King George's opposition to the claims of his American subjects that was the cause of his unpopularity with the English people; and it is, beyond doubt, true that as soon as peace was declared in 1783, granting independence to the North American Colonies, he recovered all his lost favour with his people. There never was a King more generally loved than he, except during the years of the Revolutionary War.

formed—the most excellent of constitutions. Everybody knows that it was the perfection of reason acquired by long study, observation and experience, and refined by learned and patriotic men in all ages—as Simcoe put it in his speech from the throne, "equally abhorrent of absolute monarchy, absolute aristocracy or tyrannical democracy."

It may not be without interest to see who attended the meetings of the Houses of Parliament.

During the Session of 1792, the following Legislative Councillors are noted in the proceedings as being present at some time: William Osgoode, James Baby, Robert Hamilton, Richard Cartwright, Jr., John Munro, Alexander Grant and Peter Russell. In 1793 all these were also in attendance, and in addition, Richard Duncan attended, having been sworn June 17th, 1793. He had been appointed in the previous August, and hailed from Rapid Plat.

As is the case with the Legislative Council, I do not know of any record kept of the attendance of members of the Assembly; but from the proceedings it is clear that of the sixteen members elected for the assembly in the first Parliament at least thirteen were in attendance at some time during the first session. The names of all but Joshua Booth and Parshall Terry appear as taking some part—Philip Dorland, of course, could not act.

In the second session I find the names of thirteen recorded as taking some part in the proceedings, Major Van Alstine among them. Those whose names do not appear are Hugh Macdonell, Parshall Terry and Nathaniel Pettit.

This was a very fair attendance, but it does not seem that all attended every day, as Sept. 18, 1792, a resolution was

passed that nine members should make a House; and this number was reduced on Oct. 10, to eight.

There had always been a difficulty in England of securing attendance of members of the House of Commons; and one statute, 6 Henry VIII., ch. 16, was passed punishing the absence of a member by deprivation of pay. No other punishment has ever been enacted in England.

In Ireland they were cursed with absentee members. In one instance it is said a member was an absentee for twenty years but no means were taken to compel attendance.

In Scotland absentees were liable to a fine. It is said: "By ancient law absentees were liable to be unawed and amerced in fines"; the fines were substantial, and "without prejudice of what further censure Parliament shall think fit to inflict."

In the Upper Canada Parliament there does not appear to have been any necessity for such measures.

(EDITORIAL.)

THE PANAMA CANAL.

The international status of the Panama Canal continues to be a prolific source of discussion by magazine writers, and the different issues involved have been taken up on both sides of the Atlantic from the standpoint of international law.

The documents which ought to be considered in order to obtain a thorough understanding of this question are:—

1. The Clayton-Bulwer Treaty of April 19th, 1850;
2. The Hay-Pauncefote Treaty of Nov. 18th, 1911, and
3. The Bunan-Barilla Treaty of Nov. 18th, 1903.

The Clayton-Bulwer Treaty was intended to control the neutrality of any canal between the Atlantic and Pacific.

The Hay-Pauncefote Treaty directly referred to the present Panama Canal, now being completed, the object in view of the high contracting parties being to follow, as nearly as possible, the lines laid down by the convention of Constantinople, October 29th, 1888, which were then agreed upon by the signatories as the regulations governing the Suez Canal.

The Bunan-Barilla Treaty provided for the acquisition, by the United States, of a strip of land 10 miles in width, through which the Panama Canal is cut.

The basic principles underlying the Clayton-Bulwer Treaty are as follows: the two contracting parties bound themselves not to obtain any exclusive control of such ship canal, and not to acquire, either directly or indirectly, the commerce or navigation through such canal which should not be open on the same terms to the subjects and citizens of other countries, and to protect contractors in the making of such canal on fair and equitable lines, to withdraw protection if unfair discrimination were made in favour of the commerce of one of the contracting parties over the commerce of the other. Article 8 of the Act bearing on this matter is here quoted in full.

“Article VIII.—The Government of Great Britain and the United States, having not only desired in entering into this convention to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection by treaty stipulations to any other practicable communications whether by canal or railway, across the isthmus which connects North and South America; and especially to the inter-oceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of . . . Panama. In granting, however, their joint protection to any such canals or railways as are by this Article specified, it is always understood by Great Britain and the United States that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid governments shall approve of as just and equitable; and that the same canals or railways, being open to the subjects and citizens of Great Britain and the United States on equal terms, shall also be open on the like terms to the subjects and citizens of every other State which is willing to grant thereto such protection as Great Britain and the United States engage to afford.”

The Hay-Pauncefote Treaty, on the other hand, instead of contemplating the construction of the canal by private enterprise, deals specifically with its construction and financing by the United States, and the removal of any objection which might have arisen under the Clayton-Bulwer Treaty to the construction of the canal by the United States, as being one of the contracting parties. The guiding principle was, however, neutralization of the canal when completed.

Article 3 provides that the United States should adopt the rules embodied in the convention of Constantinople for the free navigation of the Suez Canal: (1) The canal shall be free and open to the vessels of commerce and of war of all nations observing these rules, on terms of entire equality, so that there shall be no discrimination against any such nation or its citizens or subjects, in respect of the conditions or charges of traffic or otherwise—such conditions and charges of traffic shall be just and equitable. (2) The United States is to be at liberty to maintain military police for the protection of the canal. (3) Provisions are added regarding the vessels of war of a belligerent. (4) No belligerent shall embark or disembark troops. (5) Waters adjacent or within three military miles of the canal shall be regarded as within its ambit. (6) The plant, and so forth, part of the canal shall enjoy immunity. Article 4. No change of territorial sovereignty or of international relations of the country or countries traversed by the canal shall affect the general principle of neutralisation.

Apparently the reason of the United States in granting immunity from tolls to the coasting vessels of its own nationality, was, in some measure, to obtain a return for the enormous sum of £80,000,000 which it is assumed that the canal will cost. In order to support this view, much ingenuity has been exercised by apologists for the action of the United States in endeavouring to evade the issue as to whether or not such action was discrimination, and a violation of the basic principle of the Clayton-Bulwer and Hay-Pauncefote Treaties. From the speech by President Taft, published in this issue, a thorough comprehension of the views held by him is to be obtained, and there is no doubt that both the President and his advisers, and the people of the United States, appreciate that the action of the United States, with reference to coastwise shipping, was a mistake. This is borne out by the speech of Mr. Root, in the Senate at Washington, with reference to the matter, which justifies the confidence the Government of Great Britain had in the good faith of the United States, and its reverence for the sacredness of treaty obligations.

EDITORIALS.

The following despatch from London with reference to the Criminal Law Amendment Act speaks for itself.

The Criminal Law Amendment Act of 1912, popularly known as the white slave traffic bill, has just come into operation in Great Britain, and, whatever may be the opinion of reviving the practice of flogging those persons convicted under the Act, it is true that so far the moral effect of the new law has been salutary.

From France comes the news that several well-known procurers and procuresses have already, after years of residence in England, fled to France and that Deputy Denais is preparing to interrogate M. Steeg, the Minister of the Interior, on the subject, asking what steps the Government has taken to exclude from France foreigners whose sole means of livelihood has been derived from the white slave traffic, and also to see if the English police cannot furnish sufficient evidence against returning French slavers to send them to local prisons.

Meanwhile a new department to put into execution the Act has been created at Scotland Yard, the members of which have full power to arrest on sight any suspicious person seen leaving with, or meeting, any young girls at the railway stations or boat landings. Heretofore such arrests could only be made upon sworn charges or upon ocular evidence of the police that a crime was being actually committed.

It is a great pity that the infliction of the lash as a means of punishment is not meted out to a certain class of offenders much more frequently, for governors of prisons, penitentiaries and other places of correction state that the most hardened criminals, even those guilty of murder, look upon paying the penalty of their crimes on the gallows with much greater equanimity than they do to receiving the lash.

No punishment for certain classes of offences can have so salutary an effect as this same use of the lash. This is evidenced in no uncertain manner by the dispatch above quoted, and it is hoped that a similar amendment will immediately be enacted in Canada notwithstanding the protest by well meaning but ill-informed humanitarians.

Information from Ottawa shews that numerous petitions are being sent to the Government protesting against the passing of the proposed new Bank Act. The greatest dissatisfaction appears to be directed against the clause authorizing an audit to be made by shareholders instead of an out and out Government inspection. No matter how influential the banks may be through members on both sides of the house, the general public appear to be thoroughly aroused as to the importance of having an independent government inspection, and at the same time to compel the banks to make greater concessions to the public than they have hitherto done or at present seem inclined to do, if the new Bank Act is taken as a criterion. The observations on the Act published in this issue by Mr. Peter Ryan will afford illuminating information as to the conditions existing in other countries when compared with those in our own banks.

One matter, which, when the subject of banking is under discussion, should be fully discussed, is the conditions governing the employment of bank clerks. In this issue is published a statement from the *Labour Gazette*, which is the result of an enquiry made into this question, and when the responsibility of the ordinary bank clerk is taken into consideration, the facts presented in the *Labour Gazette* give much food for thought as to whether the working employees in the banks, who so materially assist in enabling the institutions in which they are employed to pay large dividends, are equitably treated.

PERSONAL.

The law partnership existing between Alexander Ross and Henry V. Bigelow, Regina, is to be dissolved. Mr. Ross will continue to practice in the offices formerly occupied by the firm in the Kerr Block, while Mr. Bigelow has formed a partnership with Mr. Bruce T. Graham, and under the name of Bigelow & Graham will open offices in Rooms 301 to 303 Kerr Block. Mr. Graham is a son of Mr. Justice Graham, of the Supreme Court of Nova Scotia, and for the last year has lived in Edmonton, Alta.

John Allen, a junior member of the firm of Tuper, Galt, Tupper and McTavish, has received the appointment as deputy attorney-general, in succession to R. B. Graham, whose resignation was accepted several weeks ago. The announcement of the important appointment was made yesterday by Hon. James Howden, Attorney-General, immediately on the completion of the holidays and his return from Brandon.

It has not definitely been decided when Mr. Allen will enter upon his duties, but it is understood that Mr. Graham will devote a portion of his time during the session at least to the duties of his office in handling the private bills for the legislature. The appointment of Mr. Allen is considered a good one. He is a young man who has made rapid strides in his profession, which he has followed for the past six years.

Miss E. L. Paterson, of Vancouver, is on the list of successful candidates in the first year at the Ontario Law School, at Osgoode Hall, Toronto. Miss Paterson is a graduate of McGill University.

J. C. Brokovski, the well known Macleod barrister, has become associated with the law firm of Loughheed, Bennett & McLaws, of Calgary, and has already gone to Calgary to take up his new duties. Mrs. Brokovski will follow about the first of March.

Sir C. H. Tupper and his late partner, W. H. Griffin, are engaged in a law suit, the dispute arising out of difficulties in settling their accounts.

Relatives have received a cablegram announcing the death of Mr. I. C. Haley, of Bradford, England, a member of the law firm of Russell and Co. Mr. Haley had, for many years, made regular trips for his firm, covering the territory between Montreal and Detroit.

A new legal firm has just been formed in Quebec under the name of Drouin, Sèvigny, Drouin and Grenier.

M. F. X. Drouin, C.R., former attorney-general of the province of Quebec, is the head of the firm. The other members are M. Omer Drouin, M. Albert Sèvigny, M.P., for Dorchester, Paul Drouin and M. Honoré Grenier.

Mr. M. Wilkins, barrister, late of Arthur, has opened up a law office in the Canadian Building, 84 Victoria street.

St. Thomas will have a new law firm after the first of the year, a partnership having been formed between Ald. E. C. Sanders and Andrew A. Ingram. The latter has for some years been in charge of the legal department of the M. C. R. here and is a rising young barrister. He is a native of St. Thomas, being a son of A. B. Ingram, former M.P. for East Elgin and now a member of the Ontario Railway and Municipal Board.

Mr. Ingram's successor at the M. C. R. offices has not yet been named.

Mr. P. J. Summers, editor of the *Evening Herald*, St. Johns, Nfld., who withdraws from that paper to-day, hopes on Monday to resume his legal practice, which he at no time wholly abandoned. He is as yet undecided as to his new offices, but will probably locate on Duckworth street. His many friends wish him every success in his resumption of his legal work.

T. H. Crerar, of the firm of Crerar & Crerar, Hamilton, which was dissolved in June, last, owing to the death of the late P. D. Crerar, K.C., has taken into partnership LeRoy E. Awrey, who for several years was associated with the firm of Gibson, O'Reilly & Levy. The new firm will be known as Crerar and Awrey, and will continue business in the offices of the Hamilton Provident building, for so many years occupied by Crerar & Crerar.

Rev. Dr. Eakin, for the past five years a member of the faculty of Toronto University, has resigned to take up the practice of law. In addition to his connection with the university, Dr. Eakin has from time to time supplied the pulpit of St. Andrew church, King street, Hamilton, and has occasioned considerable comment from his view as to eternal punishment.

The law firm of McQuarrie, Martin & Cassady has a suite of six rooms on the sixth floor of the Westminster Trust block, New Westminster.

Francis Ramsay Ball, K.C., one of the oldest barristers in the province, died at his home at Woodstock on January 27th, aged eighty-five years.

He was one of Woodstock's most prominent and public-spirited citizens, and took a foremost part in the beautification of streets and parks.

For forty years he was County Crown-Attorney for Oxford, during which he was one of the prosecution counsel in the Birchell murder trial, being succeeded in office by his son, Robert N. Ball.

Mr. Bernard W. Russell, son of Hon. Mr. Justice Russell, Halifax, who has been practising law at Kentville in association with Roscoe & Roscoe, has been admitted a member of the legal firm of O'Conner and Meagher, Halifax.

T. A. Lynd and E. P. St. John have opened an office for the practise of law in suites 33 and 34, Willoughby block on Twenty-first street, Saskatoon. A. Lynd comes from Moosomin, where he studied under Judge Brown, and since January has been with the firm of Bence, Stevenson and Lynd. E. P. St. John finished his law course with B. D. Macdonald of this city and has since been practising with his brother, Charles W. St. John in Vancouver. Both are well known in the city, Mr. St. John being especially known in sporting and musical circles.

Collingwood is to lose another prominent and well-known citizen, Lt.-Col. G. W. Bruce, who will go shortly to the Manitoba city of Brandon.

Col. Bruce will enter the legal firm of Coldwell, Coleman & Curran, taking the place of the latter, who was recently appointed to the King's Bench of Manitoba. The firm, of which Hon. G. R. Coldwell, Minister of Education, is the senior member, has been in Brandon many years and enjoys a wide practice.

A convention in Montreal, to be attended by the Lord Chancellor of England, the Right Hon. R. L. Borden, Sir Wilfrid Laurier, ex-President Taft, the president of the French Cour de Cassation, the battonier and distinguished members of the Paris Bar, such is the function which will take place in Montreal next September, if the carefully-laid

plans of the American Bar Association materialize. The association, as had already been stated, has definitely decided to hold its annual convention in Montreal, and it is proposed to make the event one of the most memorable in the history of the organization. At the present moment, Frank Kellogg, president of the association, is on the high seas, bound for England and France, where he will get in touch with the leading lights of the French and English Bars, with a view to insuring their presence at the gathering, while Frederick E. Wadham, secretary-treasurer of the association, after spending the day here, left last night for Ottawa, where he will interview the Prime Minister, the Chief Justice, the leader of the opposition, the Minister of Justice, and other distinguished gentlemen resident in the Capital.

Seven members of the legal profession in the province of British Columbia have taken silk as a New Year's gift from the Provincial Government. The gentlemen who thus become entitled to write K.C. after their names are:—D. G. Marshall, S. S. Taylor, W. A. McDonald, and W. B. A. Ritchie, of Vancouver; W. J. Whiteside of New Westminster, and Thornton Fell and Lindley Crease of Victoria. The Provincial Government has always been very sparing in the practice of granting this honour to members of the legal profession, only twelve K.C.'s having been created in British Columbia in nearly six years. Five of these were created in 1907, and those which are announced to-day make up the rest of the dozen, none having been created in the interval of five years.

At a meeting of the Law Society, held on Monday last, the following were elected Benchers: H. H. Carter, K.C.; J. A. Clift, K.C.; M. W. Furlong, K.C.; C. H. Emerson, K.C.; W. E. Wood, K.C.; C. O'N. Conroy, and J. P. Blackwood.

THE FRONTENAC LAW ASSOCIATION.

At the annual meeting of the Frontenac Law Association, held yesterday afternoon, the resignation of John McIntyre, K.C., president of the association since the resignation of the Hon. Mr. Justice Britton, was received and accepted with the sincerest of regrets. Mr. McIntyre has been an able and gifted officer and one who has been keenly interested in all the affairs attending his office and he spared neither time nor energy in the promotion of the welfare of the society. He attended the various sessions of the Upper Canada Law Society and through his efforts the recognition which has come to the Frontenac branch was brought about. Following the dissolution of the firm of McIntyre & McIntyre it became necessary for Mr. McIntyre to retire from the activity of an office. Nevertheless it is felt that the distinguished and faithful gentleman will continue to take an interest in all the workings of the society.

A resolution expressing the regret of the association at the loss of Mr. McIntyre was moved by J. B. Walkem, and unanimously passed. A copy of the same will be forwarded to him. The society has received four distinct losses during the past year, viz.: John McIntyre, K.C., Donald McIntyre, J. Macdonald Mowat and R. V. Rogers.

The report of the treasurer, secretary and librarian shewed that the association was in a healthy condition, but in order to supply funds for further activity it was decided to increase the annual fees by 100 per cent. The assurance was given that before another year the library, to which has been added some 2,200 volumes in six years, will be in improved quarters at the Court-house, with better light and accommodations.

The following officers were elected: president, John L. Whiting, K.C.; vice-president, J. B. Walkem, K.C.; secretary-treasurer, T. M. Asseltine; trustee, Francis King, to replace John McIntyre, K.C.; library board, T. J. Rigley, to replace Donald McIntyre.

RESULT OF RECENT LAW EXAMINATIONS IN BRITISH COLUMBIA.

At the quarterly meeting of the Benchers of the Law Society the results of the recent law examinations were announced as follows:—

Preliminary—Messrs. M. C. M. Rutherford, H. C. R. Clark, G. T. S. Saundby, P. R. Margetson, G. H. Sedger.

First Intermediate—Messrs. G. Lindsay, B. Boyd. E. V. Finland, H. C. DeBeck, C. W. Abercrombie, G. A. King, A. J. Knowling, S. L. Grey, R. G. Robson, Wm. Warner, G. E. Hartley, T. L. O'Keefe, G. H. Larnder, E. B. Irving, H. I. Bird, H. L. Hunt, A. D. King, R. A. Braden and D. H. McKay.

Second Intermediate—Messrs. R. M. Chalmers, A. C. Scaling, H. H. Bayle, W. A. Riddell, C. G. Beeston, A. G. Cameron and R. J. Clegg.

Students for call—Messrs. E. M. McLorg, E. C. Weddell, C. E. Falkner, W. O. Fulton, N. R. Fisher, W. Clayton and J. M. McLean.

Articled clerks for admission—Messrs. T. C. M. McLorg, E. C. Weddell, W. O. Fulton, N. R. Fisher, W. Clayton, C. E. Falkner, J. M. McLean and A. Donaghy.

B. C. Solicitors for call—Messrs. J. E. Beck, J. Hogg, A. H. Bain, G. W. Black, T. Pearse, A. T. Sanders, P. H. Read.

Eastern Barristers for call—Messrs. F. Harding, H. W. Bucke.

Eastern Solicitor for admission—Mr. E. G. P. Baker.

Eastern Barristers and Solicitors for call and admission—Messrs. J. R. Green, C. MacDonald, J. G. Gibson, F. Layton, D. N. Wemyss, J. J. Martin, T. B. Hooper, R. Smith, R. G. Affleck, W. J. Jephson, William Steers and J. D. McMurrich.

English Barristers for call—Messrs. V. Gordon, G. H. Head, C. H. Sleight, J. C. Gwynne, M. M. Greaves and G. H. Darrell.

English Solicitors for admission—Messrs. T. Harston, W. W. Crompton.

Irish Barristers for call—Messrs. D. P. W. Maunsell, R. A. F. Gill.

Irish Solicitors for admission—J. H. Evans, T. S. Porter and T. T. McCredy.

Scotch Solicitors for admission—Messrs. MacMillan, W. G. C. Stevenson.

Queensland and New South Wales Barristers for call—Mr. F. J. Lyons.

The final men with the exception of Mr. Maunsell, who was not present, were called and admitted respectively as entitled and were introduced to Hon. Mr. Justice Gregory by Mr. Luxton, K.C., when they were sworn in and signed the rolls.

MANITOBA BAR ASSOCIATION.

The ratification of a new solicitors' tariff, the adoption, with certain modifications, of the report of the council, and the election of officers for the new year, were matters of business transacted at the conclusion of the annual banquet of the Manitoba Bar association held in the Royal Alexandra hotel last night. J. A. M. Aikins, K.C., M.P., president of the association, was in the chair, and to his right and left as honoured guests sat Chief Justice Mathers, and Judges Perdue, Haggart, Macdonald, Curran, Galt, and Public Utilities Commissioner Robson.

R. W. Craig submitted the annual report of the council which dealt with legal, educational and crown office rules; proposed amendments to the Masters' and Servants', Workmen's Compensation, and Arbitration Acts; consolidation of the charter and by-laws of the Winnipeg Judicial District; changes in the form of legal documents, and which included congratulatory reference to the elevation of Judges Galt and Curran to the Court of King's Bench. Mention was also made of the loss sustained by the association in the death of the late J. E. O'Connor, K.C., in London, England. A memorial was adopted advocating an increase in the salaries of the members of the judiciary.

Officers elected for 1913 were: Hon. President Chief Justice Howell; president, J. A. M. Aikins. Council: for the two year term: J. B. Coyne, S. J. Rothwell, E. Loftus, H. W. Whitla, T. Hunt, D. W. McKerchat, F. Fisher, W. J. Tupper; for the one year term: A. N. McPherson, W. H. Trueman; central judicial district, F. G. Taylor, Portage la Prairie; western judicial district, S. E. Clements, Bran-

don; southern judicial district, N. P. Buckingham, Boissevain; northern judicial district, H. F. Maulson, Minnedosa, and G. W. Eakins; eastern judicial district, Isaac Campbell, E. Anderson, A. E. Hoskin, R. M. Dennistoun, A. B. Hudson and R. W. Craig.

HAMILTON LAW ASSOCIATION.

TRUSTEES' THIRTY-THIRD ANNUAL REPORT.

The membership of the Association at the date of the last Annual Report was 74, and the present membership is 78.

The number of bound volumes in the library, exclusive of sessional papers and Government reports, is 4,982, of which 125 volumes have been added during the year.

The Trustees to the extent of the funds at their disposal have kept the Library supplied with all the latest appropriate legal publications, and the Library is kept insured for the sum of \$8,800.

The trustees report, with regret, the resignation of Miss Counsell, she having filled the office of Librarian for many years with unflinching devotion, great knowledge and skill, but are gratified also to report the appointment of Miss M. E. Mackay as Librarian, who has occupied the position now for about a year, to the entire satisfaction of the trustees and the profession generally.

The trustees report with regret the deaths of Mr. Charles Lemon and Mr. P. D. Crerar, K.C. The former of whom was a member of this board and treasurer for many years, and the latter was a distinguished member of the profession and has occupied the position of trustee of this Association.

The officers and trustees elected at annual meeting January 11th, 1913

President—S. F. Lazier, K.C.; Vice-President—Wm. Bell, K.C.; Treasurer—W. A. Logie; Secretary—W. T. Evans.

Trustees—Geo. Lynch-Staunton, K.C., S. F. Washington, K.C., T. C. Haslett, K.C., E. D. Cahill, K.C., Geo. S. Kerr, K.C.

All of which is respectfully submitted.

MARGARET E. MACKAY,
Librarian.

The following students at the Law School, Osgoode Hall, have passed the Christmas examinations for the first year:—C. Black, S. Factor, C. A. Payne, C. Finlayson, P. E. F. Simly, C. A. Paul, J. S. Duggan, L. C. Jarvis, Miss E. L. Paterson, Miss M. E. Buckley, M. C. Purvis, R. O. Daly, H. A. O'Donell, J. M. Riddell, S. M. Phoenix, P. L. Armstrong, W. R. Campbell, H. Blake, Jr., H. N. Farmer, J. V. Guilfoyle, W. H. Beatty, H. E. Manning, J. E. Lawson, A. H. Plant, J. K. Paul, T. Eakin, J. U. Garrow, W. W. Parry, C. F. Leonard, C. W. G. Gibson, C. H. Watson, J. H. Best, T. J. Galligan, T. J. Murphy, F. H. Barlow, J. F. Strickland, W. G. Hanna, A. C. Casselman, W. D. Bell, G. E. Edmonds, F. A. A. Campbell, M. E. Mulhern, K. B. Maclaren, J. H. Naughton, H. R. Alley, M. Aylesworth, N. M. Retallack, C. P. Plaxton, T. J. MacEwen, J. P. Walsh, C. F. Elliott, D. McConnell, J. Idington, G. McTeigue, A. H. Robertson, J. A. W. Robinson, J. G. Bole, R. Code, G. B. Jackson, S. M. Scott, E. M. Rowand, N. A. Keys, F. Baalim, D. B. Sinclair, J. O. Buckley, G. M. Malone, F. C. Richardson, W. R. Willard, Tom. Brown, J. C. MacFarlane, J. G. A. M. Schiller, N. J. Macdonald, H. W. Macdonnell, R. B. Whitehead, A. Chenier, H. B. Neely, W. G. Lumsden, C. J. Bovaird, R. H. Green, W. S. Montgomery, H. McConnell, R. A. Olmsted, J. S. McLaughlin, D. McArthur, L. V. Fitzpatrick, D. E. Dean, C. H. Higgins, A. L. Shaver, R. S. Clark, W. F. Greig, J. J. Hunt, R. A. Patchell, O. A. Lauzon, W. M. Cox, W. B. McPherson, R. L. White, A. J. Johnson, S. H. Brown.

The following students at the Law School, Osgoode Hall, have passed the Christmas examinations for the second year:—Isidor Finberg, H. S. Hamilton, E. R. Thomson, F. E. Hetherington, L. Macaulay, P. W. Beatty, J. R. Rumball, S. Rogers, D. W. Lang, W. P. MacKay, S. J. Birnbaum, N. S. Caudwell, A. Singer, E. H. Cleaver, S. G. Metcalfe, E. Bristol, G. W. Walrond, H. A. Beckwith, G. D. McLean, L. C. Outerbridge, Wm. McNally, J. F. P. Birnie, V. E. Gray, H. Obee, R. M. Dick, E. M. Reeve, L. W. Wood, J. S. Beatty, H. S. Robinson, J. W. Broudy, H. H. Ellis, A. W. Langmuir, O. Sauve, W. H. Bennett, E. P. Dowdall, B. H. L. Symmes, J. W. Gauvreau, N. M. Young, R. B. Law, C. L. Carrick, W. H. Furlong, H. D. Anger, J. A. Hope, B. F. Fisher, S. E. Wedd, L. Dale, J. E. Anderson, C.

W. Carruthers, H. A. L. Conn, H. H. Donald, B. P. Fitzpatrick, V. H. Hattin, C. B. Henderson, R. N. McCormick, E. F. McDonald, C. R. Widdifield, C. H. A. Armstrong, L. W. Goetz, J. G. Holmes, E. C. Awrey, H. J. Stuart, C. J. F. Collier, C. G. Mortimer, W. Lawr, D. J. Coffey, W. T. Robb, W. N. Hancock, G. H. Tennent, W. M. Mogan, C. G. Robertson, J. A. Donovan, J. M. Forgie, H. Morwick, L. S. LeVernois, W. B. Henderson, W. W. Evans, W. J. Grace, E. Papler, W. L. L. Gordon, J. F. Coughlin, J. S. Allan, G. W. Morley, T. M. Mulligan, D. G. McIntosh, F. Regan, D. D. McLeod, R. B. Williams, F. H. M. Irwin, J. M. Baird, J. A. Devaney, W. H. Male.

The following students at the Law School, Osgoode Hall, have passed the Christmas examinations for the third year:—J. L. Duncan, J. W. Pickup, E. V. McMillan, D. A. MacRae, G. T. Walsh, A. L. Fleming, W. J. McCallum, F. G. Dyke, T. S. Elmore, G. W. Adams, W. H. Ford, N. A. McLarty, S. Cowan, C. G. McCullough, G. M. Miller, W. K. Fraser, A. J. Gordon, N. Phillips, J. P. Barlow, N. L. LeSueur, Miss J. Cairns, H. F. Parkinson, T. Crosthwaite, P. J. Knox, A. H. Foster, H. Friedman, R. W. Treleaven, J. B. Moon, A. A. Macdonald, E. Sugarman, D. A. Macdonald, N. S. Macdonnell, R. R. Evans, E. M. Dillon, J. M. Donahue, H. L. Slaght, J. H. Bone, J. C. McRuer, W. F. Schwenger, C. P. Tisdall, C. G. French, H. Saunders, L. S. Cuddy, J. H. McDonald, G. H. Shaver, M. Herzlich, J. Y. Murdoch, J. F. L. Cote, J. J. Greenan, H. R. Moses, B. L. Bedford, W. H. Cook, J. Wearing, A. L. Brady, R. H. G. Ivey, G. R. Forneret, H. E. Wallace, G. M. Willoughby, M. Gordon, E. H. Senior, F. H. White, K. W. Wright, A. Ellis, F. C. Gullen, G. P. McHugh, A. E. Parkinson, W. G. More, E. Braden, J. M. Greer, W. A. Dillon.

MINISTER OF JUSTICE AT MCGILL.

The annual dinner of the McGill law students was held Saturday night at Freeman's Hotel, Montreal, with Hon. C. J. Doherty, Minister of Justice, as guest of honour. Chief Justice Davidson, of the Superior Court; J. L. Archambault, K.C., battonnier of the Montreal Bar; R. C. Smith, K.C., and Deans Walton and Moyses were also at the head table. Mr.

M. T. Burke, president of the Law Undergraduates' Association, presided. Regrets were received from Right Honourable R. L. Borden, Sir Wilfrid Laurier, Sir Francis Langellier, Sir Lomer Gouin and Hon. A. R. Angers.

About sixty students attended the dinner, which was also attended by representatives of Harvard, Laval (Montreal), Laval (Quebec), and Bishop's College.

The Minister of Justice, in replying to the toast in his honour, proposed by Mr. John MacNaughton, stated that to a large extent the fate of the country was in the hands of the lawyers. The profession had had in the past, and still had, a large part to play in the moulding of the destinies of the country, and in teaching their fellow countrymen the differences between right and wrong. The old proverb that it is righteousness which exalteth a nation, still held good, he declared, and there was no body of men which could contribute more to the righteousness of the nation than the members of the legal profession.

It was necessary for a young man, he continued, to have a proper realizing sense of the power, dignity, and responsibility of the profession which he had undertaken to practice.

Other toasts were as follows: Alma Mater, proposed by A. K. Hugessen and responded to by Dean Moyse; The Bench, S. McDougall and Hon. Mr. Justice Davidson; The Faculty, H. E. Herschorn and Dean Walton; The Bar, O. S. Tyndale, J. L. Archambault, R. C. Smith and J. Creelman; Sister Universities, R. Moyse and A. Macdermott (Harvard); Graduating Class, S. G. Dixon and M. T. Burke.

In speaking of the growth of the Faculty of Law at McGill, Dean Moyse gave some interesting comparisons by quoting from the files of the *Gazette* for the year 1855, one article stating that the Law Faculty was in an encouraging situation, as it had, besides a full professor, a lecturer to assist in the work.

He also spoke of the needs of McGill, and said that the demands made during the recent campaign would not be the last tax on the generosity of Montreal by any means.

The menu was enlivened by the fact that the various courses were christened after well-known students in the third year, and by the addition of legal terms of a more or less humorous and appropriate nature.

The Committee in charge of the dinner consisted of Messrs. M. T. Burke, D. Gilmour, H. Scott, A. Mills, J. Kerry, and H. Howard.

PRESENTATION TO CHIEF JUSTICE WETMORE.

The retirement of Hon. E. L. Wetmore, Ex-Chief Justice of Saskatchewan, has not been permitted to go into effect without another example of the esteem in which he is held by members of the legal fraternity.

Yesterday afternoon, J. F. Frame, president of the Regina Bar Association, presented the Ex-Chief Justice on behalf of the association with a handsome polished black ebony cane, with a gold head, on which was inscribed the name of the recipient and the fact that it was presented by the Regina Bar Association.

P. H. Gordon, as secretary of the association, read an appreciative address.

The address was illuminated and on parchment. The presentation took place at the Court-house in the presence of a large number of lawyers.

A COMMON BRITISH CITIZENSHIP.

The report which comes from Ottawa of the conditions for naturalization which have been accepted over the Empire, and which only awaits the necessary legislation, are:—

1. The Government may grant a certificate to an alien who:—

A. Has resided in his Majesty's Dominions for a period of not less than five years, or has been in the service of the Crown for not less than five years within the last eight years before the application; and

B. Is of good character and has an adequate knowledge, in the case of Canada, of the English and French language; and

C. Intends if his application is granted either to reside in his Majesty's Dominions or to serve under the Crown.

2. The residence required is residence in the country granting the certificate for not less than one year immediately preceding the application, and previous residence, either in the same country or in some other part of his

Majesty's Dominions for a period of four years within the last eight years before the application.

And there are some further provisions, such as the reserving of discretionary power to the Government and the taking of the oath of allegiance.

The gist of the proposed law, put briefly, is Imperial citizenship after five years residence within the Empire, and acquaintance with one of the languages officially recognized; in England, Australia and New Zealand, English alone; in Canada, English or French; in South Africa, English or Dutch.

WORKMEN'S COMPENSATION LAWS ARE SIMPLE AND EFFECTIVE IN ENGLAND.

(EVIDENCE OF AN AMERICAN EXPERT.)

Mr. Sherman is a graduate of Yale University and of Columbia Law School, was formerly commissioner of labor of the State of New York and has spent much time in Europe studying compensation laws. A summary of his remarks is as follows:—

“Insurance is not an essential feature of the compensation law. Where insurance is required in a compensation law, that requirement is simply an ancillary method of effectuating the purpose of the liability thereby imposed upon the employer.

“There is a specific danger under the compensation law that insurance may thwart the purpose of that law as a regulation for accident prevention. If the employer with a high risk is enabled to insure his liability at the same rate as a competitor with a distinctly lower risk, then the effect of the compensation liability as an incentive to the employer to study out methods and to incur expense to cut down his rate will be defeated. The cost of his insurance is the civil penalty each employer pays for maintaining the hazards of his business and to be effective it must be closely proportionate to those hazards.

TWO PROBLEMS PRESENTED.

“Therefore, we have two problems which are logically absolutely distinct. The first problem is to frame a just

and beneficial compensation law. The second problem is to determine how far insurance should be required to effectuate the purpose of the compensation law. Great care must be exercised not to confuse these two problems; otherwise you are apt to sacrifice much of the good to be derived from a proper compensation law by muddling it in a harmful experiment in social insurance.

"Whether insurance should be compulsory or optional under the compensation law, is a question that should be determined by experience. It should be made compulsory only if and where reasonably necessary in order to assure to injured workmen the payment of their compensation. In no event, therefore, should those concerns that are amply able to carry their own insurance be required to buy insurance or to contribute to a state scheme; for that would be pure economic waste."

It is on this portion of Mr. Sherman's argument that the C. P. R. claims that it should have the right to provide its own insurance.

In commenting upon the Washington law Mr. Sherman said:—

"One serious objection to the Washington law is that it makes an employer not only an insurer of his own workmen, but an insurer of the workmen of all his competitors in the same trade, thus multiplying his risk. It taxes him a heavy premium, but does not really insure him because he is subject to another assessment in case the funds run short."

THE BRITISH LAW.

Both the Washington and Ohio laws have been made attractive by their exceptionally low rates, but these are merely experimental rates, and cannot be maintained. Neither state board has published a report in the form and with the details required of private insurance companies. Under neither law has there been sufficient experience to justify any conclusion as to the sufficiency of the rates or the cost of the scheme.

The British law makes the employer directly liable for compensation to his injured workman and permits him to insure it or not as he chooses and how he chooses.

Sir William Meredith asked what would happen in case the employer broke down and fled from the country.

"The plant is always left," replied Mr. Sherman, "and the accident liability would be a preferred claim."

PREFERS ENGLISH LAW.

Mr. Sherman analyzed the German law in detail in an effort to shew how complicated it was and how unsuitable it would be in Ontario. When asked which one he preferred, he emphatically said that he preferred the British.

"The English law is comparatively simple," he said. "It imposes upon the employer a direct liability to compensate his employes for accidental injuries arising out of and in the course of their employment. The scale of compensation is approximately 50 per cent. of the estimated wage loss from injury, beginning at the end of the first week and under conditions reverting back to the date of injury. The employer may insure or not at his option. Disputes may be settled by arbitration. An employer and his workmen may by agreement substitute a scheme of mutual benefit insurance.

"From the foregoing the conclusion is obvious. For us to adopt substantially any integral part of the German workmen's insurance law would be a leap in the dark—it would be making the welfare of our people the playfield of impulsive experiment and would entail a radical change in our political principles and in our social and industrial habits and customs. Both the British and German laws, although in different ways and to different degrees, are products of gradual development. Even if our ideal be a system of broader and more perfect insurance than that provided by the British law, yet prudence dictates a course of gradual approach. The safest and most surely beneficial first step on that course would be the adoption of an adaptation of the earlier form of the British law."

CROSS-EXAMINATION—ITS BENEFITS AND DEFECTS.

BY ALBERT S. OSBORN.

Some cross-examination is unnecessarily cruel, much cross-examination is actually damaging to the case of the cross-examiner, and the great mass of cross-examination is useless and utterly inane and silly.

The most unscientific work in the practice of the profession is undoubtedly done in cross-examination; it usually starts without plan or purpose; it arrives nowhere, and most of it should be omitted altogether. Silliness can be forgiven, the waste of time perhaps excused, but the unnecessary cruelty should be condemned and prevented.

The traditions of the law too often allow even the petty lawyer, who may be held in contempt by his neighbors, to stand behind the protecting shrubbery of legal precedent and throw mud at them as they pass by. Too often he is permitted to insult respectable men and sensitive women with an assurance, impunity, and brutality that is a sad commentary upon the profession.

Cross-examination is highly valuable, and an indispensable part of the conduct of a trial, but, like many good things, may be abused and diverted from its true purpose, which is to serve as an aid in eliciting truth and a means of promoting justice; too often it is used for exactly the opposite purpose. It would seem that the conscientious witness, who has told damaging truth, must be attacked, humiliated, and insulted, even if the testimony itself cannot be successfully assailed.

The inexperienced spectator of such a proceeding wonders that such things can be permitted in this enlightened age, and is astounded to learn that it is not only permitted to continue, but too often applauded by the profession. The lawyer, through familiarity with the spectacle, does not seem to be able to fully understand its enormity.

The Judge should be given greater control over this matter of cross-examination, as well as the whole conduct of a trial, and the sentiment of the profession should not simply frown upon, but should condemn, such flagrant, dishonest, and disgraceful acts.

Think of a merchant or a banker doing such things day after day and not being condemned! But in the lawyer it

too often is excused if not actually applauded, by the profession.

By such methods fraud may actually win against the facts in what is called a Court of justice, and those who are thus defeated are inclined to say in earnest what the wag said in jest, that a Court is a place where justice is dispensed—with.

Cruel cross-examination of the honest witness should be prevented, and the flabby, inane, purposeless exhibitions of supposed rational men, which constitutes the bulk of the usual cross-examination, should be reduced in volume. In the investigation of the Titanic disaster, one witness was asked what an iceberg is composed of, and he promptly replied, "Ice."

Hundreds of questions of the most trivial, idiotic character are asked every day in Courts of law to no purpose, and great deserts and wastes of words are used in examinations like the following:—

"Q. Where were you standing—in the road, or on the grass?"

"A. On the grass.

"Q. Was the grass green or brown?"

"A. Green.

"Q. Will you on your oath *swear* it was green (with great emphasis on swear)?"

"A. Yes (very timidly).

"Q. Was it *all* green, or partly green (emphasis on 'all')?"

"A. All green (almost inaudible).

"Q. Do you not know that all grass is only partly green?"

"A. No (very low).

"Q. (with great severity and very loud). Are you as sure of what you have sworn to in this case as you are of the color of the grass that day?"

"A. (very timidly). Yes, sir.

"Q. That is *all* (with distinct emphasis on 'all')."

The technical witness, who knows his rights and has told the truth about a subject he understands much better than the examiner can hope to understand it, is, of course, able to protect himself, and can in most cases enforce his testimony on cross-examination. He cannot always escape slurs, if not open insults; but the average lawyer is at once at a disadvantage when he does not have for a victim the usual inex-

perienced witness, who does not know his rights, and who can easily be taken advantage of.

It is seldom, indeed, that any but the greatest lawyers have the self-control and cool judgment not to cross-examine at all. The usual practice is to make copious notes of the testimony, much of it only half correct, and then carry the witness back over the whole story, thus making it clearer and stronger.

Lawyers as a rule resent hotly any suggestion that the Judge should be given more power over the conduct of trials, and the Legislatures of many states, made up mostly of lawyers, have so restricted the power of the Judge that he is only a sort of moderator or umpire, whose business it is to keep order and prevent the lawyers from breaking up the furniture of the Court-house, and he must be very careful to do even this in a way that "does not prejudice the case before the jury."

The interests of justice would be promoted by restoring the old common-law powers to the Judge, as now exercised in Canada and England. When the old powers are restored, then all should unite to see that only the best possible Judges are selected. The capable, upright, unprejudiced, fearless Judge, whose hands are not tied, is the living embodiment of the spirit of justice, and an advocate not of a party of the first or the second part, but of the truth.

When we ourselves take a just cause into Court, we are not so much interested in the game the lawyers are playing with the law as we are to have justice done, and to see to it that honest witnesses are protected from biting sarcasm and bitter insult. One thing the upright and powerful Judge can do is to protect the inexperienced, who are brought into Court to help prove the truth, and to cut short, or at least a little shorter, those spectacles in Courts of law called "cross-examination," that the angels must look down upon with pity and with horror.

PRIVY COUNCIL DECISION.

ROYAL BANK OF CANADA V. PROVINCE OF ALBERTA.

The Privy Council has allowed the appeal of the Royal Bank of Canada from the judgment against the bank in the Alberta Provincial Court to paying over to the provincial government a sum involving \$6,000,000 held in connection with the Alberta and Great Waterways Railway project. The question argued before the Privy Council was the validity of an Act of the legislature.

The Lord Chancellor, in delivering judgment, said that it was a question of great importance, and proceeded to review exhaustively the grounds for appeal, going on to speak of the public uneasiness shewn in 1910, about the action of the government in entering into arrangements concerning the railway. While a Royal Commission of Enquiry was sitting, there was a change of government. The new administration introduced and passed two statutes, and on the validity of the first of these, the question to be decided in appeal turned.

This statute, after setting out in the preamble that the railway company had made a default in payment of interest on bonds and in the construction of the line, and then ratifying and confirming the guarantee by the province of the bonds, enacted that the whole of the proceeds of the sale of the bonds, and all interest thereon, including such part of the proceeds of the sale as was then standing in the banks in the name of the treasurer of the province or otherwise, and comprising *inter alia* the six million dollars, and accrued interest in the appellant bank, should form part of the general revenue fund of the province, free from all claim of the railway company, and be paid over to the treasurer without deduction.

It was also provided that, notwithstanding the form of the bonds and guarantee, the province should, as between itself and the railway, be primarily liable on the bonds, and should indemnify the company against claims. By another statute, passed at the same time, any person claiming to have suffered loss or damage in consequence of the passing of the act might submit his claim to the government.

The Lord Chancellor went on to cite the steps subsequently taken in legal proceedings.

Continuing he said: "Their Lordships are not concerned with the merits of the political controversy which gave rise to the statute, the validity of which is impeached. What they have to decide is the question whether it was within the power of the legislature of the province to pass the Act of 1910. They agree with the contention of the respondents that in a case such as this it was in the power of that legislature subsequently to repeal the act which it had passed. If this were the only question which arose, the appeal could be disposed of without difficulty, but the Act under consideration does more than modify the existing legislation. It purports to appropriate to the province the balance standing at special discounts in banks, and so change its position as regards a scheme for the carrying out of which bondholders had subscribed their money.

"Elaborately as the case was argued in the judgments of the learned Judges in the Courts below, their Lordships, are not satisfied that what appears to them to be the fundamental question at issue has been adequately considered. It is a well-established principle of English common law that when money has been received by one person, which in justice and equity belongs to another, under circumstances which render the receipt of it a receipt by the defendant to the use of the plaintiff, the latter may recover. As for money had and received to his use, the principle stands, and as to cases where the money has been paid for a consideration that has failed, the present case appears to fall within the broad principle on which judgments in the case of *Wilson v. Church* proceeded.

"Lenders in London remitted their money in New York, to be applied to carrying out a particular scheme established by statutes in 1909, and orders-in-council, and by contracts and mortgage of that year. The money claimed in action was paid to the bank as one of those designated to act in carrying out the scheme. The bank received the money at its branch in New York, and the general manager then gave instructions from the head office in Montreal, to the manager of the local branches for the opening of credit for special account. The local manager was told he was to act on instructions from the head office, which retained control.

"It appears to their Lordships that the special account was opened solely for the purpose of the scheme, and that when the action of the government in 1910, altered its con-

ditions, the lenders in London, were entitled to claim from the bank at its office in Montreal, the money which they had advanced solely for the purpose which had ceased to exist. Their right was a civil right outside the province, and the legislature of the province could not legislate validly in derogation of that right.

"These circumstances distinguish the case from that of *King v. Lovett*, where the point decided was in reality quite a different one.

"In the opinion of their Lordships the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligations to return their money to the bondholders, whose right to this return was a civil right, which had arisen and remained enforceable outside the province. The statute was on this ground beyond the powers of the legislature of Alberta, inasmuch as what was sought to have been enacted was neither confined to property and civil rights within the province, nor directed solely to matters of merely a local, or private nature within it.

"Other questions have, as already stated, been raised in this appeal as to whether the statute of 1910, infringed the provisions of sec. 91 of the British North America Act by attempting to deal with a question relating to banking, and by trenching on a field already occupied by the Dominion Banking Act. It was also contended that the appropriation of deposits to the general revenue fund of the province was outside the powers assigned to the provincial legislature for raising revenue for provincial purposes.

"The conclusions already arrived at make it unnecessary for their Lordships to enter on a consideration of these questions, and of other points made during the arguments of counsel.

"Their Lordships will advise his Majesty that the appeal should be allowed, and the action dismissed. Respondents must pay costs here, and in the Courts below."

SUPREME COURT OF CANADA.

DUNN v. EATON.

N.S.]

[OCTOBER 29TH, 1912.]

Appeal—Final Judgment—Reference.

In an action claiming rescission of a contract for the sale of timber lands and other equitable relief and, in the alternative, damages for deceit, the trial Judge held that it was a case for damages only and gave judgment accordingly and referred to a referee matters arising out of a counterclaim, ordering him also to take an account of moneys paid, an inquiry as to liens and incumbrances and as to the quantity of standing timber on the lands and other proper accounts. Further consideration of the cause was reserved. This judgment was affirmed by the full Court and the defendants sought to appeal to the Supreme Court of Canada.

Held, that the action tried and determined was the common law action for deceit only; that the judgment given therein was not a final judgment within the meaning of that term in the Supreme Court Act; and that the court had no jurisdiction to entertain the appeal. *Clarke v. Goodall* (44 Can. S. C. R. 284), and *Crown Life v. Skinner* (44 Can. S. C. R. 616), followed.

Appeal quashed with costs.

Curry, K.C., for appellants.

Rogers, K.C., for respondents.

TWO MOUNTAINS ELECTION CASE.

QUE.]

[OCTOBER 29TH, 1912.]

Dominion Election—Nomination—Identification of Candidate—Powers of Returning Officer.

The failure in the paper nominating a candidate for election to the House of Commons is substantially defective if it

does not identify him by addition, residence or description, and should be rejected. DUFF and IDINGTON, J.J., dissenting.

The Returning Officer may reject such nomination after the time for nominating candidates has expired, and may declare another whose papers are sufficient, elected by acclamation. DUFF, J., dissenting.

Appeal dismissed with costs.

Mignault, K.C., and *Atwater*, K.C., for appellant.

Perron, K.C., and *Genest*, for respondent.

HESELTIME v. NELLES.

ONT.]

[DECEMBER 10TH, 1912.]

Appeal — Final Judgment — Further Directions — Master's Report.

On the trial before the Chancellor of Ontario of an action claiming damages for breach of contract, judgment was given for the plaintiffs with a reference to the Master to ascertain the amount of damages, further directions being reserved. This judgment was affirmed by the Court of Appeal. The Master then made his report which, on appeal to the Chief Justice of the Common Pleas, was varied by reduction of the amount awarded. The Chancellor then pronounced a formal judgment on further directions in favour of the plaintiffs for the damages as reduced. The defendants appealed from the judgments of the Chief Justice and the Chancellor and the two appeals were, by order, heard together but not formally consolidated. Both judgments were affirmed by the Court of Appeal and the defendants sought to appeal from the judgment affirming them and also from the original judgment sustaining the decision at the trial having applied without success to the Court below for an extension of time to appeal from the latter judgment. See *Nelles v. Hesseltine* (27 Ont. L. R. 97).

Held, BRODEUR, J., dissenting, that the only judgment from which an appeal would lie was that affirming the judgment of the Chancellor on further directions; that the Chan-

cellor could not review the original judgment of the Court of Appeal nor that varying the Master's report, and the Court of Appeal was equally unable to review them on the appeal from the Chancellor's decision; and the Supreme Court being able to give only the judgment that the Court of Appeal should have given, was likewise debarred from reviewing these earlier decisions.

Appeal dismissed with costs.

Nesbitt, K.C., and Matthew Wilson, K.C., for appellants.
Holman, K.C., for respondents.

KLING v. DOMINION FIRE INS. CO.

ONT.]

[DECEMBER 10TH, 1912.]

*Fire Insurance—Removal of Goods—Consent—Binder—
Authority of Agent.*

K. Bros. & Co., through the agents in New York of the respondent company, obtained insurance of a stock of tobacco in a certain building in Quincy, Flo., and afterwards obtained the consent of the company to its removal to another building. Later, again, they wished to return it to the original location and an insurance firm in New York was instructed to procure the necessary consent. This firm, on Jan. 14th, 1909, repaired a "binder," a temporary document intended to license the removal until formally authorized by the company, and took it to the firm which had been agents of respondents when the policy issued, but had then ceased to be such, where it was initialled by one of their clerks on his own responsibility entirely. On March 19th, 1909, the stock was destroyed by fire in the original location and shortly after a formal consent to its removal back was endorsed on the policy, the respondents then not knowing of the loss. In an action to recover the insurance:

Held, affirming the judgment of the Court of Appeal (25 Ont. L. R. 534) that the "binder" was issued without authority; that even if the insurance firm by whose clerk it was initialled had been respondents' agents at the time, they

had, under the terms of the policy, no authority to execute, and authority would not be presumed in favour of the insured as it might be in case of an original application for a policy; and that it was not ratified by the endorsement on the policy as the company could not ratify after the loss.

Appeal dismissed with costs.

D. L. McCarthy, K.C., for appellants.

Hamilton Cassels, K.C., for respondents.

GUIMOND v. FIDELITY-PHENIX FIRE INS. CO.

N.B.]

[DECEMBER 10TH, 1912.]

Fire Insurance—Insurance on Lumber—Conditions—Warranty—Railway on Lot—Security to Bank—Chattel Mortgage.

A policy insuring against loss by fire a quantity of sawn lumber in a specified location contained a warranty by the assured "that no railway passes through the lot on which said lumber is piled, or within 200 feet."

Held, that a railway partly constructed and hauling freight through the said lot, though not authorized to run passenger cars and do general business, is a "railway" within the meaning of the warranty.

A condition of the policy was that if the subject of insurance be personal property, and be or become encumbered by a chattel mortgage, it should be void.

Held, per DUFF, J.. A security receipt under the Bank Act given to a bank for advances is not a chattel mortgage within the meaning of this condition.

Appeal dismissed with costs.

Hazen, K.C., and *F. Taylor*, for appellants.

Teed, K.C., and *Fairweather*, for respondents.

IN RE McNUTT.

N.S.]

[DECEMBER 13TH, 1912.]

Habeas Corpus—Supreme Court Act, sec. 39 (c)—Criminal Charge—Prosecution under Provincial Act—Application for Writ—Judge's Order.

By sec. 39 (c) of the Supreme Court Act an appeal is given "from the judgment in any case of proceedings for or upon a writ of habeas corpus . . . not arising out of a criminal charge."

Held, per FITZPATRICK, C.J., and DAVIES and ANGLIN, JJ., that a trial and conviction for keeping liquor for sale contrary to the provisions of the Nova Scotia Temperance Act, are proceedings on a criminal charge and no appeal lies from the refusal of a writ of habeas corpus to discharge the accused from imprisonment on such conviction. DUFF, J., contra. BRODEUR, J., *hesitante*.

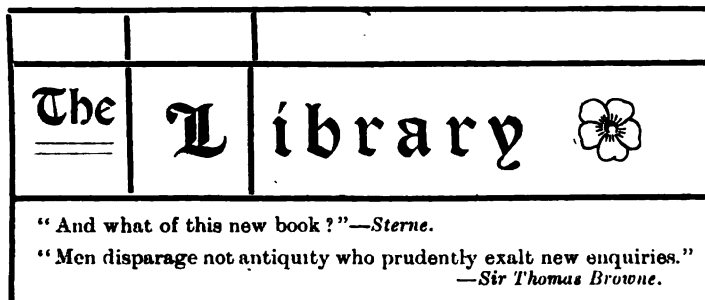
By the Liberty of the Subject Act of Nova Scotia on application to the Court or a Judge for a writ of *habeas corpus* an order may be made calling on the keeper of the gaol or prison to return to the Court or Judge whether or not the person named is detained therein with the day and cause of his detention.

Held, per IDINGTON and BRODEUR, JJ. that such order is not a proceeding for or upon a writ of *habeas corpus* from which an appeal lies under said sec. 39 (c). DUFF, J. contra.

Mr. Justice Duff held that an appeal would lie in this case but that it must fail on the merits.

Appeal quashed without costs.

Power, K.C., and Vernon, for appellant.
Ralston, contra.



Chitty's Law of Contract, Chitty's Treatise Law of Contracts, Sixteenth Edition. By Wyatt Paine, of the Inner Temple and North Circuit, Barrister-at-law. London: Sweet & Maxwell, Limited. Cloth, 35s. Toronto: Carswell Company, Limited. Cloth, \$8, half-calf, \$9.

• This standard work is presented in splendid form for a book of general use and reference by the every-day practitioner. In form it is simple, lucid, and sets out the law in few words, but every word has a meaning, and is to the point. The young barrister will recognize in this treatise a work that will be as useful to him in his daily practice as the work of Anson was to him as a student.

The different kinds of contract are explicitly set out with their form and requisites, and the manner of their construction. Contracts with agents, partners, companies, executors, etc., are all taken up as well as contracts for the sale of land and of goods, contracts of carriage, employment, for loan of money, insurance and stock exchange.

One very important chapter deals with defences of payment, accord and satisfaction, release, judgment recovered, set off, etc., another with a decree for specific performance, and damages for breach of contract, in addition to which there is an extensive appendix with notes on decided cases, which will be found particularly useful in preparation of pleadings.

An Epitome of Leading Conveyancing and Equity Cases, with some Short Notes Thereon. By John Indermaur, 10th ed., edited by Charles Thwaites. London: Stevens and Haynes.

This handy little volume with a selection chosen from Tudor's leading cases on conveyancing, and White and

Tudor's leading cases in equity has just been re-edited by Mr. Charles Thwaites, of 22 Chancery Lane, London. The notes of the various cases have been revised throughout, and a number entirely re-written, and the cases themselves are presented in the same concise form as in earlier editions, with several new ones added. As a book for students preparing for examinations this little volume is unexcelled, in addition to which it is a handy reference book for the library of the experienced pleader.

COMMUNICATION.

SIR,—The observations of "*Pro Bono Publico*," in your last issue, bring to mind an anomalous condition which exists in this province with respect to the improvement of land.

This province is deservedly noted for its richly productive land. Take, for instance, the land lying adjacent to the city of Victoria. Many a city would consider its wealth abundantly secure if it had just a part of the resource embraced in the smiling stretches of country situated at the very door of Victoria. These stretches have thousands of acres with a soil unsurpassed for the growing of vegetables and fruit. Where the conditions of soil and climate are so favourable for the raising of crops, one would naturally expect to see field after field evidencing the reward of wise and profitable husbandry. But the eye is disappointed to find only at intervals and in spots cultivated fields. Where crops have been planted the yield is invariably bountiful. But the striking testimony seen in isolated fields and orchards of the soil's bounty, serves only to accentuate the long intervals where nature runs wild in a profusion of entangled undergrowth and lofty evergreens.

Such lack of land improvement in a country where land improvement reacts decidedly to the welfare of the land owner can only be attributable to one main cause, namely, the non-availability of money for use in the improving of land. The rich lands of British Columbia, upon which eventually the permanent prosperity of the province will rest, are left to haphazard development. Beyond allocating

certain areas for pre-emptors, selling other areas, and collecting taxes, the provincial Government takes practically no interest in the improvement of the land. It seems to be assumed that it is outside the function of provincial Government to evince a paternal regard for the welfare of the man who settles on the land.

If the moneyless land settler has no recourse to the provincial Government for assistance, he certainly has no recourse to the only alternative of relief, the chartered banks of Canada, which derive their sustenance from others who, like himself, after years of unassisted struggle and toil have placed themselves in a position of independence. There are in British Columbia, no doubt, isolated instances of prosperous farmers having succeeded in obtaining small loans from banks, but, generally speaking, the farmer is rigidly excluded from the lists of the banks' borrowers.

So the farmers of British Columbia must progress slowly and toilsomely. If present conditions continue, decades may pass with just partial development here and there. Areas of rich land will have to remain in a wild state, until the time arrives when money is available for their improvement. Yet in spite of non-assistance on the part of the Government or the banks, the farmers of this province will eventually become its most prosperous and substantial class. And, no doubt, at that time, as now, governments will declare that their greatest concern is the welfare of the farmers, and the banks will take the farmers' deposits with the same regularity and divert them to uses which could hardly be called anything else but speculative.

H. M. LEONARD.

THE THREE GREAT CHARTERS OF ENGLISH FREEDOM.

"All we have of freedom, all we use or know,
This our fathers bought for us, long and long ago.
Ancient right unnoticed as the breath we draw,
Leave to live by no man's leave, underneath the law.
Lance and torch and tumult, steel and grey goose wing.
Wrenched it, inch and ell and all, slowly from the King.
Till our fathers 'stablished, after bloody years,
Now our King is one with us, first among his peers."

From the basest, the most untruthful and despicable of her sovereigns, England wrung the great charters of her freedom. From that monster of iniquity, John,—Magna Charta; from Charles the First, whose insincerity was only equalled by his mendacity,—the Petition of Right; and from James the Second, that stubborn bigot,—the Bill of Rights. Magna Charta stands first among the three great scripts that contain the fundamental principles of the British Constitution. These three constitute in the words of Lord Chatham: "The Bible of the English Constitution."

1. MAGNA CHARTA.

The great charter was largely a restoration of the ancient liberties of the realm, as granted by Edward the Confessor, before the Norman Conquest, together with a restitution of the chartered rights conceded by Henry the First, and Henry the Second, father of John. In disregard of his oath, all these notable franchises were trodden under foot and a system of despotism inaugurated by John, of whom it has been said: "Foul as it is, Hell is defiled by the fouler presence of John." Without doubt, the acts of John justify the terrible verdict pronounced by general history. For insolence, licentiousness, cruelty, ingratitude and indifference to truth and honor, he stands almost alone among the rulers of any age or of any country. The Barons, in the year 1214, in consequence of his despotic acts, withdrew their allegiance and entered upon open rebellion. The King sustaining reverse after reverse and fearing the outcome of the issue, yielded to their demands. On the 19th of June, 1215, on the little island, between Staines and Windsor, called Magna Charta Island, he, under pressure, reluctantly executed the memorable document, justly called,

the Palladium of our Liberties. It consisted of thirty-seven sections, written in the terse, vigorous style of the Latin tongue. The 29th, one of the most celebrated, closely translated, reads as follows:—"No freeman shall be taken or imprisoned, or be disseised of his freehold or liberties, or free customs, or be outlawed or exiled, or any otherwise destroyed; nor will we pass upon him, nor condemn him, but by lawful judgment of his peers, or by the law of the land. To no man will we sell, to no man deny, to no man delay, justice or right." Another leading provision, the bulwark of civic and constitutional freedom, perpetuated the right of local self-government in towns and boroughs. It thus enacts:—"The city of London shall have all its old liberties and customs. Moreover, we will and grant that all other cities, boroughs, towns and the barons of the five ports, and all other ports, shall have all their liberties and free customs." Many copies were made of the Great Charter, with the object of depositing one in the cathedral of every diocese in the kingdom. It is said there are four now extant, two, including the original, in the British Museum; one in Salisbury Cathedral, and one in Lincoln Cathedral.

The charter put in clear and unmistakable language the rights which belonged to the people from early Saxon times. It guaranteed the liberty and privileges of the clergy. The barons were shielded from irregular encroachments and unwarrantable demands for money. No man, whether free-man or serf, was to undergo imprisonment, except by the law of the land. It established the Court of Common Pleas at Westminster, in order that suitors might not be put to the inconvenience of following the King, in his progresses throughout the kingdom. Justice was brought to the very doors of the people by directing assizes to be held by the Judges, at stated times, in the different counties. It granted to foreign merchants leave to reside in England and depart therefrom without exaction. They were not to be subjected to unjust taxation or discriminating impositions. Montesquieu, in commenting upon the last named provision, remarks: "That the English have made the protection of foreign merchants one of the articles of their national liberty. They (the English) know better than any other people upon earth, how to value at the same time these three great advantages, religion, liberty and commerce."

Over six hundred years have passed since these sturdy barons of England crystallized, in the Great Charter, principles which have made liberty and justice the assured right of all living beneath the folds of her flag; principles, too, upon which she has based the free and enlightened system of trade with other nations, that has enabled her to wrest from all competitors the commercial primacy of the world.

The Supreme Pontiff, Innocent the Third, annulled the Charter, and John, at the head of foreign mercenaries, in waging war against the barons, laid waste his dominions. Soon, however, death stayed the hand of the abandoned tyrant. Thus passed into history one of the basest men of a profligate age and one of the most despotic rulers of a despotic race.

Magna Charta was confirmed in Parliament by his son, Henry the Third. In the reign of Edward the First by a Statute called *Confirmatio Chartarum*, it was declared to be part and parcel of the common law of the land; copies were ordered to be read twice a year in every cathedral church in the kingdom; and all judgments contrary to its provisions were declared void. Sir Edward Coke is authority for the statement that there were thirty-two confirmatory statutes thereof from the first Edward to Henry the Fourth.

Hallam, in reference to the Great Charter, says: "The institutions of positive law, the far more important changes which time has wrought in the order of society during 600 years subsequent to the Great Charter, have undoubtedly lessened its direct application to our present circumstances, but it is still the keystone of English liberty. All that has since been obtained is little more than a confirmation or commentary; and if every subsequent law were to be swept away, there would still remain the bold features that distinguish a free from a despotic Monarchy."

Stubbs in his Constitutional History of England, in referring to Magna Charta, remarks:—"The Barons maintained and secured the rights of the whole people as against themselves as well as against their master. . . . The whole Constitutional History of England is little more than a commentary on Magna Charta."

The Fifth Amendment of the Federal Constitution of the United States, reads as follows:—"No person shall be deprived of life, liberty or property, "without due process

of law; nor shall private property be taken for public use without just compensation."

John F. Dillon, L.L.D., Professor of Law, Columbia University, in his work on the Laws and Jurisprudence of England and America in referring to this Amendment, says:—"This was not new language, or language of uncertain meaning. It was taken purposely from Magna Charta. It was language not only memorable in its origin, but it had stood for more than five centuries as the classic expression and as the recognized bulwark of "the ancient and inherited rights of Englishmen" to be secure in their personal liberty and in their possession. It was, moreover, language which shone resplendent with the light of universal justice; and for these reasons it was selected to be put into the Fifth Amendment of the Federal Constitution, as it had already been put into the charters and constitutions of the several States."

Boutmy, in his work on the English Constitution, thus summarizes the nature of this great document: "The resistance to the King had to be political if the victory when gained was not to prove barren; it had to be of necessity, general, natural—nay even democratic—if the victory was to be gained at all. This is what imparts grandeur and originality to the mighty drama, of which the first act ended with the Great Charter, and which reached its climax with the constitution of Parliament in 1265."

Goldwin Smith is not less eulogistic: "It is" (says this great master of English) "not an Act of Parliament. It is a fundamental covenant between the Government and all the people of these realms, a covenant which was before Parliament, which is above Parliament, and with which if Parliament tampers, it may continue to reign by force, but it will no longer reign by right."

II.

THE PETITION OF RIGHT.

The sword of Heaven is not in haste to smite,
Nor yet doth linger.

After the lapse of four hundred and fourteen years after Magna Charta there was granted, by Charles the First, the second great charter of English liberty, called the Petition of Right. To have a clear conception of the

causes that led up to its enactment, it may be necessary to refer briefly to some of the leading characteristics of the princes of the Tudor and Stuart dynasties.

Despotic, as were the sovereigns of the Tudor line, and jealous, as they were, of their prerogatives, they were yet far too sagacious to place themselves in direct antagonism, much less open conflict, with their subjects. Bluff King Hal generally carried the nation with him in his foreign policy, while his people, apart from the religious excitement aroused in the matter of the divorce from Catherine, did not seem disposed to unduly interfere in questions of domestic concern. Elizabeth often stretched the prerogatives of the Crown to the verge of extreme tension, yet knowing well the spirit and independence of her people, she would graciously recede at the opportune moment, thereby enhancing her popularity. Elizabeth, too, was English in every fibre of her being. Seldom has it been in the power of a sovereign to stir a people to such sublime heights of enthusiasm, as did the great Queen, in her patriotic appeal to her soldiers, at Tilbury, when a mighty power with its "Invincible Navy," vauntingly so called, threatened the utter demolition of her kingdom. "I have," said the lion-hearted Queen, "the body of a weak and feeble woman, but I have the heart of a King, and of a King of England, too. I will be your leader. I will lay down my honor and life, in the dust, rather than my people should pass under the yoke of the boastful Spaniard."

The Stuarts, on the other hand, were craven and naturally autocratic. In their veins coursed the blood of the foreigner, that of the notable House of Guise; whence the source of those doctrines, hateful to English ears, despotic rule and the Divine Right of Kings, to uphold which they were ready to accept foreign pensions and mercenary soldiers, to subvert the inalienable rights of their subjects. They, the Stuarts, did not understand the English people and apparently made no effort to do so. James was a braggart and possessed of a braggart's conceit, contemptuously disregarding the views and opinions of others. Green, the brilliant historian, draws the following graphic sketch of him: "His big head, his slobbering tongue, his quilted clothes, his rickety legs, his goggle eyes, stood out in as grotesque a contrast with all that men recalled of Henry or Elizabeth as his gabble and rodomontade, his want

of personal dignity, his coarse buffoonery, his drunkenness, his pedantry and his cowardice. . . . His reading, especially in theological matters, was extensive; and he was a voluminous author on subjects which ranged from predestinarianism to tobacco. But his shrewdness and learning only left him in the phrase of Henry the Fourth of France—"the wisest fool in Christendom."

James, early in his reign, announced the absurd doctrine of the Divine Rights of Kings, with the kindred offshoots of passive obedience and non-resistance. In addressing Parliament, in 1610, he made use of the following blasphemous language: "The State of Monarchy is the supremest thing upon earth, for Kings are not only God's lieutenants upon earth, and sit upon God's throne, but even by God himself they are called Gods. . . . In the Scriptures Kings are called Gods, and so their power after a certain relation compared to the Divine Power. . . . It is sedition in subjects to dispute what a King may do in the height of his power. I would wish you to be careful that you do not meddle with the main points of government. . . . That is my craft. It is on undutiful part in subjects to press their King wherein they know beforehand he will refuse them."

To the like purpose was a speech made to the Judges, in 1616—"That which concerns the mystery of the King's power is not lawful to be disputed; for that is to wade into the weakness of princes, and to take away the mystical reverence that belongs unto them that sit in the Throne of God. . . . It is atheism and blasphemy to dispute what God can do: Good Christians content themselves with His will revealed in His word; so it is presumption and high contempt, in a subject to dispute what a King can do, or say that a King cannot do this or that; but rest in that which is the King's revealed will in his law."

Flatterers and sycophants encouraged the King in this preposterous doctrine. The clergy, too, proclaimed that the King by divine right was above all laws.

From his extravagance and wasteful expenditure James soon became burdened with heavy liabilities. Having from the first antagonized parliament, it doled him supplies with a sparing hand. To assert his absolute authority over taxation he resorted to the expedient of illegal impositions and unjustifiable devices to supply the deficiency of his exchequer. He raised large sums by a shameless traffic in peerages and

by heavy exactions and fines imposed by servile courts virtually under his control. The sale of monopolies was greatly extended to the detriment of legitimate trade. The new order of Baronet was created, purchasable at the price of £1,000. The old evil of purveyance was also revived.

He issued proclamations which assumed to have all the force, power and scope of laws, and these he enforced by fines and imprisonment through that vile Court, known for its infamy in all lands, the Court of the Star Chamber. He proceeded to collect customs at the ports of the Kingdom, and a servile judiciary sustained him in such a course by holding—"The seaports are the King's gates, which he may open and shut to whom he pleases." The King, it will be borne in mind, had then the absolute power of the appointment and dismissal of the Judges, for they held their commissions only during his pleasure. All of the Judges, however, were not the pliant minions of the Crown. Sir Edward Coke, when Chief Justice of England, was interrogated with the other Judges by the King, whether, in certain specified cases and particularly in matters of prerogative, they should not consult him before giving their decisions and be guided by his directions? All of the Judges, except Coke replied, "Yes." The Chief Justice said:—"When the case happens, I shall do that which shall be fit for a Judge to do." For this sublime answer, the ablest expounder of the Common Law, and England's greatest Chief Justice, was forthwith dismissed from office.

Further, the King claimed the right to determine all cases of contested elections. This assumption, together with his unlawful exactions and autocratic dealings in all matters of statecraft, led to what is generally known as "The Great Protestation." It was introduced in the Commons in the form of a resolution, debated, adopted by the House and entered in the journals. This protest was drawn up by that great Jurist and Parliamentarian, Sir Edward Coke, who, after his dismissal from the office of Chief Justice by the King, had entered Parliament and was now its leader. This protest was couched in the following terms:—"The liberties, franchises, privileges and jurisdictions of parliament are the ancient and undoubted birthright and inheritance of the subjects of England; and that the arduous and urgent affairs concerning the King, State, and defence of the Realm and the Church of England and the making and maintenance of laws, and redress of mischief and grievances which daily happen within

this realm, are proper subjects and matter of counsel and debate in parliament." The King was frantic with passion when he heard of it. He sent for the journals of the House and with his own hand tore out the pages which contained it, at the same time saying:—"I will govern according to the Common weal, but not according to the Common will." Shortly after he dissolved Parliament and ordered the imprisonment of several of its members. A crisis had now been reached which must end either in absolute despotism or in the executive administration of the affairs of the State by a Parliament responsible to the people. The question had now been narrowed down to a struggle of the survival of the fittest. It eventuated in the death of his son; it sealed the doom of his race, and resulted in the complete triumph of "government of the people, by the people and for the people."

On the death of the King, in 1625, he was succeeded by his son, Charles the First. This hapless Monarch inherited from his father the same autocratic assumption of absolute power as well as the absurd doctrine of the indefeasible and hereditary Divine Rights of Kings. In these views he was encouraged and abetted by his Queen, Henrietta Maria, daughter of Henry the Fourth of France, and sister of Louis XIII., who, under the direction of Richelieu, the Apostle of Absolutism, was now leading unhappy France onward in that downward career, which finally led to the Revolution, the reign of terror, and ultimately, after an Iliad of woes, the abolition of Monarchy.

Consequently there was a renewal of the contest between Parliament and the King. The nation being engaged in war with Spain and needing money, Charles summoned Parliament and requested a grant of £1,000,000. Parliament, instead of granting this amount, refused to grant more than £140,000. A second Parliament proved not any more acquiescent. In the meantime he resorted to the expedient of raising money by forced loans under the guise of benevolences. His evil genius, the Duke of Buckingham, led him into war with France. In 1628 Charles was under the necessity of summoning Parliament for the third time, to provide money to carry on this senseless war. Coke, now in his 78th year, framed the famous Petition of Right and carried it through Parliament. It set forth by way of petition to the King, a list of grievances, stating the refusal of the Commons to grant supplies until certain rights and privileges of the subjects should have been solemnly recognised by legislative enact-

ment, and certain enumerated wrongs redressed. It substantially was in the following terms:—

That no man be compelled to make or yield any gift, loan, of Parliament; that none be called upon to make answer so to do; that freemen be imprisoned or detained only by the law of the land, or by due process of law, and not by the King's special command, without any charge; that persons be not compelled to receive soldiers and mariners into their homes against the laws and customs of the realm; that commissions for proceeding by martial law should be revoked; all which they claimed as their rights and liberties, according to the laws and statutes of the Realm. By this Petition of Right the Commons did not seek any new liberties or additional rights or any unusual privileges, much less any infringement of royal prerogatives; but simply sought a pledge or undertaking, on the part of the King, for the faithful observance of the sacred rights and privileges founded on the Great Charter, and thus, by a new Act of Parliament, to put an end to all doubt and controversy respecting the same. It was so-called, as it only asked for an enforcement of what was justly due the people as a matter of right. Sir Thomas Wentworth thus tersely expressed, in the House of Commons, its object:—"We seek to vindicate—what? New things? No; our ancient, legal and vital liberties—by reinforcing the laws enacted by our ancestors; by setting such a stamp upon them that no licentious spirit shall dare henceforth invade them." Sir Thomas shortly after basely deserted his party and subsequently championed all the illegal acts and practises of the King and bent all his energies in advocating those prerogative rights which he had so stoutly opposed, and urged on the King in that mad career, which resulted not only in his own undoing, but that of his Sovereign as well. To the petition the King made an evasive answer, in these words:—"The King willeth that right be done according to the laws and customs of the realm, and that the statutes be put in due execution that his subjects may have no cause to complain of any wrongs and oppressions contrary to their just rights and liberties, to the preservation whereof he holds himself in conscience bound as of his own prerogative." This answer was rejected by the Commons as unsatisfactory. The King finally yielded and pronounced the formal words of unqualified assent:—"Let right be done as it is desired." The Petition of Right was entered and enrolled as a statute. The King then received a grant of five subsidies.

It soon became apparent he had treacherously designed to disregard his solemn pledge and had sanctioned the statute in order to obtain the desired subsidies. A dispute having arisen as to the right to levy tonnage and poundage, without the concurrence of Parliament, the Commons remonstrated, holding that the King by assenting to the Petition of Right had thereby renounced all claim thereto. The King, not heeding their remonstrance, proceeded with a body of soldiers to the House of Commons and found the doors locked. In great anger he ordered the imprisonment of several members without assigning any cause. Parliament was forthwith dissolved and for eleven years, from 1629 to 1640, no Parliament was called, an event unparalleled in the history of the country. Having renounced Constitutional Government, he proceeded to rule without the concurrence or assistance of Parliament. His principal advisers were Sir Thomas Wentworth, now Earl Strafford, and Archbishop Laud. He systematically violated every undertaking and promise hitherto given, and cast to the winds all the provisions of the Petition of Right. He raised the greater part of the revenue without legal authority, and those, who opposed his arbitrary and despotic acts, were imprisoned, upon his mere mandate, without any assignable cause and were left to languish in prison without citation to appear before any Tribunal or make answer to any specific charge. The nation groaned beneath the burden of these unjust and arbitrary inflictions. That diabolical Court, the Star Chamber, now reached the acme of its infamy; as did that ecclesiastical engine of religious persecution, the High Commission Court, scarcely less infamous, under the control of Archbishop Laud. Thousands, fleeing from the persecution of State and Church, crossed the estranging seas to found homes under alien skies where they might enjoy civil and spiritual freedom.

In 1640 the King, now engaged in war with Scotland and being in want of money, called his fourth Parliament. The Scotch War had its origin in an ill-advised attempt to bring the Presbyterian form of church government and mode of service in conformity with the Anglican Church, both in ritual and organization. This was the handi-work of Laud. A new Liturgy was ordered, based on the English book of Common Prayer, to be used in lieu of the form of service known as Knox's Liturgy and in general use throughout Scotland. The people rose in their might and bound themselves by a solemn covenant to resist unto death this tyrannical innovation. Par-

liament, regardless of the request of the King for money and sympathizing with the Scots, declared as of old, that a redress of grievances must precede any grant of supplies. This Parliament, known in history as "The Short Parliament," was dissolved in three weeks. After resorting to various devices to raise money, he was compelled at last to call another Parliament, the fifth and last of his reign, to obtain necessary supplies. This Parliament, known as the Long Parliament, was continued for nineteen years, the longest in the parliamentary history of England. Its legislation was momentous and far reaching. The following are some of its most important acts. It decreed that the present Parliament should not be dissolved without its own consent. It abolished the Courts of the Star Chamber and High Commission. It declared that all the acts of the King, in the exercise of the royal prerogative, were illegal.

It further decreed that only those ministers of State should be admitted to his council who possessed the confidence of Parliament. It remitted the fines and discharged from imprisonment many of the victims of the Star Chamber and High Commission Courts. Ship money was decreed illegal and the judgment in Hampden's case was annulled. By a statute in 1641, it was enacted as the ancient right of the subjects of the Kingdom, that no subsidy, custom, impost, or any charge whatsoever ought or may be laid or imposed upon any merchandise exported or imported by subjects, denizens or aliens without consent of Parliament. It suppressed monopolies and passed a Triennial Bill enforcing the assembly of the Houses every three years.

A solemn appeal was next made to the nation. This state paper known as the "Great Remonstrance," was drawn up by Pym, by many regarded as England's greatest Commoner, and laid by him before the House of Commons. It was a detailed statement of the illegal acts of the King since his accession. It emphatically denied the charge of revolutionary aims. It demanded securities for the due administration of justice, and the employment of ministers who possessed the confidence of Parliament. The answer of the King was made through his attorney, who appeared at the bar of the Lords and accused Pym, Hampden, Hollis, Strode and Haselrig of high treason in their correspondence with the Scots. On the day following, 4th of January, 1642, the King with a body of soldiers went to the House to make their arrest. In the meantime the accused members had fled. All efforts of compromise having

at length failed, both parties prepared for the last dread arbitrament of an appeal to the sword, and with what result all the world knows. Much that had been accomplished by the able administration of Cromwell was lost by the restoration of the Stuart Line, in 1660. The struggle must needs be renewed once more.

III.

THE BILL OF RIGHTS.

Over all things certain, this is sure indeed,
Suffer not the old King; for we know the breed.
He shall take a tribute, toll of all our ware;
He shall change our gold for arms—arms we may not bear.
He shall break his Judges if they cross his word;
He shall rule above the law, calling on the Lord.
Strangers of his Council, hirelings of his pay,
These shall deal our justice: sell—deny—delay.

From the time of granting the Petition of Right we pass over a period of two generations of men and another Stuart, James the Second, the fourth of his line, is on the Throne. Hopes for a better state of affairs, than existed under the rule of his brother Charles, generally obtained at the commencement of his reign. He announced his determination to govern according to the laws as then established, and that he would maintain the Church of England in her temporal dignity, although he was unwilling to communicate with her in things spiritual. This had the ring of sincerity and honesty. After the quieting of the nation, upon the conclusion of the Monmouth Rebellion, it soon became apparent, the struggle for freedom over absolutism must be again renewed. James the Second held as firmly the absurd doctrine of Divine Right, and if possible, in a greater degree, than did the first of the Stuarts. In addition, he soon began to direct his energies to the restoration of Catholicism. He sought and obtained a new High Commission Court to exercise his prerogative rights in religious matters, composed of six persons, under the presidency of the infamous Judge Jeffreys, whose brutality has passed into a proverb. Parliament allowed him to raise the Army from ten to twenty thousand men. Louis the Fourteenth of France, his cousin, granted him a regular pension for its support. Parliament, however, refused to repeal the Test Act. In the exercise of the doctrine of Divine Right, and that he was above all law, he proceeded to suspend the laws of the land when he chose, and to dispense with them in any particular case, on his own mere motion. In violation, too, of the Test Act, he proceeded to officer his troops with

Catholics and to appoint them to the highest positions of State.

A crisis was reached when the King demanded that a Declaration of Indulgence, suspending the penal laws against Catholics and Nonconformists, should be read, on two successive Sundays, by every clergyman. Sancroft, Archbishop of Canterbury, and six Bishops, petitioned the King against it. They were imprisoned, the charge being for writing and publishing a false, malicious and seditious libel. On trial they were acquitted on the Constitutional ground, that the dispensing power claimed by the King was illegal, and that every subject had a right to petition his Sovereign. The acquittal of the Bishops was greeted with the wildest enthusiasm; even the soldiers on Hounslow Heath, it is said, placed there by order of the King to overawe the capital, joined in the general acclaim. The patriots acted with great promptness when all hope of conciliation seemed out of question. They urged the Prince of Orange, who had married Mary, eldest daughter of James, to come to their assistance. The Prince acceded to the request and shortly after landed at Torbay with 13,000 soldiers. James seeing all was lost, on the 18th of December, 1688, escaped to France. A convocation was called, consisting of the members of the House of Lords, and those members of the Commons who had sat in the Parliament of Charles, together with the Lord Mayor, the Aldermen and the Common Councilmen of the city of London. The convocation invited William to assume the temporary administration of the Kingdom and to summon as representatives all the persons, who would have been summoned to a regular Parliament, to a convention, to take into consideration the state of the nation and to provide for the permanent settlement of the Crown.

The convention declared the Throne to be vacant, the King having "abdicated" by deserting his people and taking refuge under a foreign power. The Crown was offered to William and Mary, during their lives and the life of the survivor, under the proviso, that they would accept it and undertake to govern under the conditions set forth in a Declaration of Rights. This famous document was drawn up by that great jurist, Lord Somers, subsequently Lord Chancellor, and on the 13th of February, 1689, it was presented to the Prince and Princess, setting forth the following terms:—

"That King James did, by the assistance of divers evil counsellors, endeavour to subvert the laws and liberties of this

kingdom, by exercising a power of dispensing with and suspending of laws; by levying money for the use of the Crown by pretence of prerogative, without consent of Parliament; by prosecuting those who petitioned the King, and discouraging petitions; by raising and keeping a standing army in time of peace; by violating the freedom of election of members to serve in Parliament; by violent prosecutions in the Court of King's Bench, and causing partial and corrupt jurors to be returned on trials; excessive bail to be taken; excessive fines to be imposed, and cruel punishments to be inflicted; all of which were declared to be illegal." It concluded as follows:—"And they do claim, demand, and insist upon all and singular the premises as their undoubted rights and liberties."

The Prince and Princess of Orange consented jointly to accept the Crown upon the terms and conditions set out in this Declaration of Rights. On the 16th of December, 1689, this settlement, embodied in an Act of Parliament and framed substantially upon the lines of the Declaration of Rights, with certain other provisions, received the Royal assent and thereby ended the dispute, continued for centuries, between King and Parliament.

The following extracts taken from it, I. W. & M. ch. 2, will sufficiently shew its general scope and bearing.

1. That the pretended power of suspending laws, or the execution of laws, by regal authority, without consent of Parliament, is illegal.

2. That the pretended power of dispensing with laws, or the execution of laws, by regal authority, as it hath been assumed and exercised of late, is illegal.

3. That the commission for erecting the late Court of Commissioners for ecclesiastical causes, and all other commissions and Courts of like nature, are illegal and pernicious.

4. That levying money for or to the use of the Crown by pretence of prerogative, without grant of Parliament, for longer time or in other manner than the same is or shall be granted, is illegal.

5. That it is the right of the subjects to petition the King, and all commitments and prosecutions for such petitioning are illegal.

6. That the raising or keeping a standing army within the kingdom in time of peace, unless it be with consent of Parliament, is against the law.

7. That the subjects which are Protestants may have arms for their defence suitable to their conditions, and as allowed by law.

8. That election of members of Parliament ought to be free.

9. That the freedom of speech, and debates on proceedings in Parliament, ought not to be impeached or questioned in any Court or place out of Parliament.

10. That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

11. That jurors ought to be duly empanelled and returned, and jurors which pass upon men in trials for high treason ought to be freeholders.

12. That all grants and promises of fines and forfeitures of particular persons before conviction are illegal and void.

13. And that for redress of all grievances, and for the amending, strengthening and preserving of the laws, Parliament ought to be held frequently.

The Bill of Rights marks the greatest epoch in the constitutional history of England. The theory, that the King is responsible to God alone, and that the people under his rule, however unjust, wrong or cruel it may be, must quietly remain passive and non-resistant, at length received its death blow, and in lieu thereof, by the great democratic revolution of the sixteenth and seventeenth centuries, was enunciated for all time that better and true doctrine, that the people have a divine and inalienable right to govern themselves, and that the King is one of them, though "first among his peers." Henceforth the centre and force of the State were transferred from the Crown to the House of Commons. It was further established that the people, through their representatives, may depose the King, change the line of succession and put whomsoever they choose upon the Throne; in other words, that the King is as much a creature of an Act of Parliament as any other official in the realm. Constitutional Monarchy was at last established upon an impregnable basis. By a subsequent Act the Judges were appointed for life, or during good behaviour, and could only be dismissed for cause, upon the address of both Houses of Parliament, thus taking from the Crown the means of influencing judicial decisions in the interpretation of the laws of the nation. The pernicious system of the appointment of the Judges being vested in the Sovereign and their dismissal by the like power, tended to make them,

through an influence so potent, and one too often brought to bear, the ready instruments of unconstitutional rule. During the reign of Charles the Second three Chief Justices and three Lord Chancellors and six puisne Judges were, on political grounds, dismissed from office by the King, and their places filled with subservient followers. By such pliant tools was wrought the judicial murder of those eminent statesmen, Lord W. Russell and Algernon Sidney. A question, and one of considerable importance, remained unsolved for some time—how far the prerogative right of the Sovereign (if any existed) extended in the appointment, retention or dismissal of Ministers of the Crown? Germane to this was the further question—what (if any) was the right of the Sovereign in matters of administration or in the settlement of the general policy of Government? On the part of the Commons it was contended that the Ministers of State should be chosen by the party which was in a majority in the House of Commons, and their tenure of office should depend on the retention of the confidence of this majority. The practical working out of the constitution upon the lines indicated finally solved these vexed questions without any violent wrench or disturbance of the settled order of government. Long after 1688 the control of the government was largely in the hands of the peers and leading governing families, whose influence at Court was great, and who by composite ministries, and playing off party against party, succeeded in keeping themselves in power. During the reign of the Georges there was a notable advance in the independence and growing influence of the House of Commons. In the first Cabinet of George the Third only one of its members held a seat in the House of Commons and thirteen in the Lords. In 1783 Pitt was the sole Cabinet Minister in the Commons. In 1832, out of a Cabinet of fifteen, six were Commoners. All disturbing questions have at last been substantially settled, and the delicate and well-poised machinery of government, with its checks and counter checks, works with ease and great regularity. Within the prescribed limits, of what is now called Responsible Government, rests ample power to adjust all conflicting questions and harmonize all disturbing influences. The Cabinet system has so grown that it is said to overshadow every other power in the State. Now, "the King is a Sovereign who reigns, but does not govern." It is a far cry from the twentieth century to 1265, when the House of Commons, so called, made its first appearance as a part of the national Parliament. During the

Barons' war, in the thirteenth century, that great champion of popular rights, Simon de Montfort, by the victory of Lewes having dethroned his brother-in-law, Henry the Third, summoned to his Parliament of 1265, not merely representatives of the counties, but also of the cities and boroughs. This event marks the initial stage in the development of the popular branch of Parliament, known thereafter as the Commons. On the fatal field of Evesham de Montfort fell fighting for the national cause; but his work did not die with him. From an event, apparently insignificant, has gradually been evolved the type which now forms a model for all free and enlightened governments. "It was the writ (says Green) issued by Earl Simon that first summoned the merchant and trader to sit beside the Knight of the Shire, the Baron and the Bishop, in the Parliament of the Realm." The functions of the increased representatives at first were limited to inquiry into the grievances of the people and reporting them to Parliament. They were seated in the same chamber with the peers, bishops and barons, but took no part in speaking or voting in Parliament. They simply consented to the taxes imposed upon their constituents. In the reign of Edward the Second they were assigned a separate chamber. By the time of Edward the Third three great constitutional principles were established which materially increased their importance. First,—The illegality of raising money without the consent of both branches of Parliament. Second,—The necessity for the concurrence of the Lords and Commons in any alteration of the laws. Third,—The right of the Commons to inquire into public abuses, and to impeach ministers of the Crown for malfeasance. The Stuarts for a time made serious inroads upon these sacred and chartered rights, yet the eternal principles of justice ultimately prevailed. And thus down through the centuries the representatives of the people have won their way against untold odds and have finally attained the proud distinction of having devised, through persistent effort, the strongest, freest and best form of government yet formulated by the ingenuity of man, and justly styled by Burke—"The triple cord—King, Lords and Commons—which no man can break; the solemn, sworn constitutional frank-pledge of the nation."

St. John, N.B.

SILAS ALWARD.

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INVESTIGATION OF THE FARMERS BANK.

REPORT OF ITS ORGANIZATION, CONDUCT, AND FAILURE,
BY SIR WILLIAM MEREDITH, K.C.M.G.

To His Royal Highness Field Marshal Prince Arthur William Patrick Albert, Duke of Connaught and of Strathern, Earl of Sussex, in the peerage of the United Kingdom, etc., etc., Governor-General and Commander-in-Chief of the Dominion of Canada:—

In pursuance of the commission of Your Royal Highness, dated the twelfth day of February, one thousand nine hundred and twelve, by which I was appointed a Commissioner to make investigation into all material and relevant facts in relation to:—

(a) The incorporation by Act of Parliament of The Farmers Bank of Canada, and the organization thereof;

(b) The application for and the giving by the treasury board of the certificate permitting the bank to issue notes and to commence the business of banking;

(c) The conduct and operation of the business of the bank, the amount of capital subscribed and paid up, the cause of the suspension and failure, and the extent of the liabilities and the value of the assets thereof.

I have made the investigation which I was appointed to make, and have the honour to report:—

Before dealing in detail with the special matters as to which inquiry is directed, it will be convenient to give a brief outline of the history of the bank from its incorporation until its suspension.

The bank was incorporated in the year 1904, by 4 Edw. VII., ch. 77.

The applicants for the Act were James Gallagher, of the village of Teeswater; John Watson, of the town of Listowel;

John Ferguson and Alexander Fraser, of the city of Toronto, and Alexander Shepherd Lown, of the village of Drayton, and they are named in the Act as the provisional directors of the bank.

The capital stock was fixed at \$1,000,000, and, subject to sec. 16 of The Bank Act, the Act was to remain in force until 1st July, 1911.

By an Act passed in 1905 (4-5 Edward VII., ch. 92), it was provided that the Treasury Board, notwithstanding anything contained in the Bank Act or in ch. 77 of the statutes of 1904, incorporating the Farmers Bank of Canada, might within two years from the 18th July, 1904, give to the bank the certificate required by sec. 14 of the Bank Act, and it was further provided that if the bank did not obtain the certificate within that time "the rights, powers, and privileges conferred" on the bank by the Act of incorporation and by the Act of 1905 should "thereupon cease and determine, but otherwise" should "remain in full force and effect notwithstanding sec. 16 of The Bank Act."

By another Act, passed in 1906 (6 Edw. VII., ch. 94), the time for obtaining the certificate of the Treasury Board was extended for six months from the 18th July, 1906, and this Act contained a provision similar to that contained in the Act of 1905, as to the consequences of failure to obtain the certificate within that time, and as to the Act remaining in force, notwithstanding sec. 16 of The Bank Act.

Section 16 of The Bank Act provides that:—

"16. If the bank does not obtain a certificate from the Treasury Board within one year from the time of the passing of its Act of Incorporation, all the rights, powers, and privileges conferred on the bank by its Act of incorporation shall thereupon cease and determine, and be of no force or effect whatever," and it was in consequence of this provision that it was necessary to obtain the extensions which were granted by the Acts of 1905 and 1906.

The provisional directors met for organization on the 26th August, 1904, and, after having appointed John Ferguson, M.D., as chairman and Alexander Fraser as secretary, and transacting some other business, passed the following resolution:—

"The first block of \$500,000 of the capital stock shall be offered at par value, viz., \$100 each share at the price of \$100 per share, and the payments on the same shall be as

follows: \$5 per share on subscription, a further \$15 per share on allotment, and eight equal monthly payments of \$10 each per share on the first day of each and every of the eight months immediately succeeding the date of such allotment."

Public notice was subsequently given that stock books, upon which would be recorded the subscriptions of such persons as should desire to become subscribers in the bank, would be opened on the 6th September, 1904.

On that day another meeting of the provisional directors was held, at which the following resolution was passed:—

"That \$500,000 capital stock of the Farmers Bank of Canada be placed in the hands of Mr. C. H. Smith for sale at par, and that he be allowed a commission of five per cent. on all stock placed, and that the agreement to be entered into under this minute continue in force until the 6th of January, 1905, subject to such further extension as may then be deemed expedient, and shall contain a clause that the board may at any time rescind this agreement, provided that satisfactory progress has not been shewn."

At the same meeting it was resolved that the provisional directors should be paid their railway fare, and for each meeting to those living out of Toronto \$20, and to those living in Toronto \$10.

At a meeting held on the 26th November, 1904, a prospectus was approved and directed to be printed.

The first allotment of shares appears to have been made by the provisional directors on the 23rd December, 1904, and subsequent allotments were made from time to time by them.

At a meeting of the provisional directors held on the 5th September, 1906, a resolution was passed authorizing the giving of notice of a meeting of the subscribers for shares for the purpose of organization when the Government deposit should have been made.

The deposit was made on the 23rd October following:—

Notice of the meeting to be held on the 26th November following was given; it is dated the 18th October, 1906, and was first published in the Globe newspaper on the 22nd, and in the Canada Gazette on the 27th of that month.

The meeting was held pursuant to the notice, and at it a report of the provisional directors, which bears date the 22nd November, 1906, was read and adopted, and their acts

were "confirmed, ratified, and approved," and directors were elected and by-laws passed.

On the day following this meeting an application for the issue of the certificate of the Treasury Board was made; the application was accompanied by what purported to be a list of the shareholders, and among other documents a statutory declaration of W. R. Travers, the general manager of the bank, in which, referring to the list of shareholders, he declares that it is "a list of the subscribers to the capital stock of the said bank correctly setting forth as to each subscription, the name of the subscriber, his address, the number of shares subscribed for by him, the amount of such shares, and the amount paid in thereon," and that each of the subscriptions "is a *bona fide* subscription to the capital stock" of the bank.

At a meeting of the Treasury Board held on the 30th November, 1906, the issue of the certificate was authorized, and the certificate was issued on that day.

The bank began business on the 2nd January, 1907, and suspended payment on the 19th December, 1910, and was subsequently ordered to be and is now in process of being wound up.

I proceed now to deal in detail with the matters as to which I am directed to inquire.

It is not without significance, I think, as bearing upon the subsequent history of the bank, that its incorporators, who became its provisional directors, had no experience in the business of banking, or in any other business in which they would have acquired the knowledge essential to the successful launching of a bank.

The provisional directors found much difficulty in procuring subscriptions for a sufficient number of shares to enable the bank to be organized and to obtain authority to issue notes and commence the business of banking.

The issue of \$500,000 authorized at the meeting of 6th September, 1904, was first placed in the hands of Mr. C. H. Smith for disposal, and he was to receive a commission of 5 per cent. "on all stock placed."

The progress made by Smith in obtaining subscriptions seems to have been slow, for on the 13th February, 1905, at a meeting of the provisional directors a motion was proposed by Dr. Ferguson and seconded by Mr. Fraser:—

"That in view of the fact that the charter of the Farmers Bank will lapse at an early date, and it is evident there are going to be grave difficulties in the way of disposing of the capital stock of the bank, be it resolved that all moneys paid on shares now placed be returned, and the expenses up to date be defrayed equally by the provisional directors."

The motion, unfortunately, in the light of subsequent events, did not commend itself to the other directors, Messrs. Lown, Gallagher and Watson, and it was lost.

After the defeat of this motion, it appears to have been decided to continue the efforts to obtain the necessary subscriptions, for immediately following it a motion made by Dr. Ferguson and seconded by Mr. Fraser:—

"That an application be forthwith made to the Parliament of Canada for an extension of time for obtaining the certificate of the Treasury Board,"
was carried.

Efforts continued to be made to obtain the necessary subscriptions, but they do not appear to have been attended with much success, until after the 10th March, 1906, when Mr. W. R. Travers appeared upon the scene, and an agreement was entered into between him and the provisional directors by which he was authorized "to sell all the capital stock" except portions of it which Smith and a firm of Toronto solicitors had been entrusted to sell. According to the terms of this agreement, Travers was to receive a commission of ten per cent. on the stock sold by him, payable one-half on the signing of the subscription and payment of deposit, and the balance on allotment, and, subject to ratification by the permanent board of directors elected by the shareholders, he was to be engaged as general manager of the bank for five years certain, to date from the issue of the certificate of the Treasury Board, at a salary of \$4,000 for the first year, increasing by \$1,000 in each of the subsequent four years, and if he should not be continued as general manager after the five years, he was to receive a pension of \$1,500 a year during the remainder of his natural life.

The agreement contains other terms which it is not necessary to mention, and a provision that the expenses of the provisional directors, if they did not up to the date of the agreement exceed \$16,000, should be paid out of the funds of the bank and that "the literature, office rent, and other incidental expenses of a like nature" should be paid by the bank.

At the same meeting, a resolution was passed that Lown and Smith should be given positions in the bank on its organization, Lown as secretary, and Smith as manager of a branch or an equivalent position in the head office, and that in the event of their not being continued in office for a period to be agreed on between them and Travers, an adequate allowance should be made to them by pension or bonus, and a further resolution that an allowance of \$3,000 each should be made to Ferguson and Fraser for their services and outlays as provisional directors in the organization of the bank, and that these sums should be paid when the bank should be ready for business.

On the 4th July, 1906, the agreement of the previous 10th March was put an end to, and a new agreement was entered into between Travers and the provisional directors.

By the new agreement it was provided that Travers was to be "allowed to sell" all unsubscribed shares of the first issue of \$500,000 at par, and the remainder of the capital stock (\$500,000) at such premium as might be decided on, up to the time at which the duties of the provisional directors should cease, and that he should be paid a commission of ten per cent. for the expenses of selling the stock, "payable one-half on the signing of the subscription and payment of deposit, and the balance on allotment;" that the provisional directors should be bound to allot all the stock on the application of Travers, and to make "all legal calls thereon," and at his request to call all meetings and do all acts which should be legally necessary for the organization of the bank, and that Travers should be engaged as general manager for five years certain to date, from the issue of the certificate of the Treasury Board, at a salary of \$5,000 for the first year, increasing by \$1,000 in each of the subsequent four years.

This agreement also contained a provision similar to that of the earlier agreement as to a pension to Travers and as to his engagement as general manager being subject to ratification by the directors to be elected by the shareholders.

The agreement also provided that "the literature, office rent, and other expenses" of the organization of the bank should be paid by the bank, and confirmed all acts done by Travers, and "all accounts incurred by him as general manager" up to the date of the agreement, and it further provided that Travers "accepted the legitimate accounts"

as they then stood on the books for the expenses of organization to that time, and that he would allow to the provisional directors and Smith, who was also a party to the agreement, \$20,000 as remuneration for their "services, surrender of charter," etc., to be paid out of the funds of the bank if confirmed at the meeting of the subscribers, and that Travers should thereafter have full control of the office of the bank and all the affairs pertaining to its organization.

By a contemporaneous agreement the provisional directors and Smith agreed to assign to Travers "all their claims and interest" under the other agreement, and Travers agreed to accept their claim under it and to take "the responsibility of the claim and to pay the \$20,000 to them immediately upon" their passing the necessary resolution to give the legal notice calling a meeting of the subscribers for the organization of the bank, and on the same day Travers paid them \$10,000 on account of the \$20,000, and an agreement was made between the provisional directors and Smith for the division of the \$20,000 between them as follows: to Lown and Smith each \$5,000; to Ferguson and Fraser each \$3,500; and to Watson and Gallagher each \$1,500, and the \$10,000 was divided between them in those proportions.

The \$10,000 paid by Travers was provided by paying him that sum on account of the commissions out of the money of the bank in the hands of the provisional directors, and the payment was authorized by a resolution passed on the same day.

Another agreement bearing the signatures and seals of all the parties to the agreement of the 4th July, 1906, was adduced in evidence; it bears the same date and is in all respects identical with that agreement except that the rate of commission is stated to be 15 per cent. According to the testimony of Travers this agreement was the final one between the parties and the one that was acted on, but the contrary was stated by the provisional directors who gave evidence.

It is unnecessary for the purpose of the inquiry to determine on which side the truth lies, and I therefore make no finding as to it.

It appears clear from these agreements and resolutions that what was intended was to sell the charter of the bank

to Travers and to put him in control of its organisation and business, and that the provisional directors should abdicate their functions and act in accordance with his directions, and that is what followed.

Travers at once set about obtaining the requisite subscribers and a vigorous canvass for that purpose was entered on, especially after an agreement was made in the following August between him and W. J. Lindsay for the latter assisting in the work and for an equal division of the commission between them.

A prospectus was issued by the provisional directors some time in March, 1906, and no doubt after the agreement of the 10th, as it appears to have been approved of by them at a meeting held on the 21st of that month. A copy of it appears in the return brought down to the House of Commons pursuant to an order of the House of the 16th January, 1911 (exhibit 5, pp. 10, 11 and 12).

The prospectus contains the names of a number of persons who it is stated had consented to act as directors if elected, four of whom were called as witnesses on the inquiry and each of whom testified that as to him the statement was incorrect and unauthorized.

How far, if at all, persons were induced to subscribe in consequence of these statements does not appear.

The form of application to be signed by an applicant for shares appears on pp. 13 and 14 of the return, and that form was used in most if not all cases; it provides for the payment in respect of each share of \$10 on signing the application, \$20 on allotment, and the remainder in seven equal monthly instalments of \$10 each, the first of them to be paid in 30 days after allotment, and the succeeding ones at intervals of 30 days, and gives to the applicant the right to pay in full on allotment.

In a number of cases a promissory note was given by the applicant for the full amount of his subscription, payable in most cases in twelve months to the order of "the provisional directors of the Farmers Bank of Canada."

In many cases no payment in cash was made at the time of the application or up to the time of allotment.

Questions having arisen as to the legality of taking promissory notes in settlement of subscriptions for shares, and as to the payment of commissions on such subscriptions, at a meeting of the provisional directors held on the 23rd

June, 1906, it was decided to take the opinion of Messrs. Urquhart, Urquhart & McGregor, a firm of Toronto solicitors, on the questions and to instruct Travers not to accept notes in lieu of cash and that the conditions set forth in the form of application should be adhered to "on a cash basis unless otherwise specially authorized by the Board."

Apparently only the first question was submitted to the solicitors, and their opinion as to it was that the provisional directors had power to accept subscriptions where the applicant gives his promissory note in payment for the shares in the place of or in addition to "giving his subscription in the usual manner," and though the note should mature "at a time different from the payments in the subscriptions." A copy of this opinion was adduced in evidence and is exhibit 13.

On the 4th July, following, the resolution "calling for the selling of stock on a cash basis" was rescinded.

I have no doubt that one reason, at all events, and probably the main one for accepting promissory notes, was that Travers might be enabled by means of them to raise money to make up the cash deposit which had to be made as one of the conditions precedent to the issue of the certificate of the Treasury Board.

On the 5th September, 1906, as I have mentioned, authority was given to give the notice of the meeting of the subscribers for organization as soon as the Government deposit should have been made; this authority was given to Travers and he was authorized to do all other acts necessary for calling the meeting.

It is not open to question that \$500,000 of the capital stock had not been then subscribed, and that \$250,000 had not been paid by the subscribers.

It was contended that the statement in the statutory declaration of Travers, made on the 27th November, 1906, to which I have referred, and a copy of which appears on pp. 7 and 8 of the return (exhibit 5), that the list of subscribers marked exhibit D. to the declaration correctly set forth as to each subscription the name of the subscriber, his address, the number of shares subscribed by him and the amount of his shares, and that each subscription was a bona fide subscription to the capital stock of the bank was untrue. The number of shares subscribed for, as shewn by the list, was 5,792, though by an error in the addition it was stated

to be 5,789, and the amount subscribed was \$579,200, a corresponding error as to this having been made in adding up the figures; of these shares it was, however, stated that 35 were subscribed after the 22nd October, 1906, which, as I have mentioned, was the date of the first publication in the Globe newspaper of the notice calling the meeting of the subscribers, and Travers appears to have thought that subscriptions received down to and including that day, but not those received after it, were to be taken into account in making up the \$500,000 which sec. 13 of the Bank Act requires to be bona fide subscribed before the meeting of the subscribers is called.

If the 22nd October, 1906, be the determining date, and as I think allotment was necessary to constitute an applicant for shares a subscriber within the meaning of the Act, the statement as to the number of shares that had been bona fide subscribed for was untrue, and on the hypothesis I have just mentioned less than 5,000 shares had been subscribed for.

If, however, all the shares for which bona fide applications had been then made were properly included, or the determining date was the date of the meeting of the subscribers, the statement was true.

I express no opinion as to what date is the determining one, as my function is not to pass upon questions of law but only to determine questions of fact.

The statement in the declaration that the list of subscribers correctly set forth as to each subscription "the amount paid in thereon," and the statement that the \$250,000 deposited to the credit of the Minister of Finance and the Receiver-General was paid out of the moneys paid in and which actually had been received in respect of the shares, was literally true, but was calculated to deceive the Minister of Finance as to the real facts and was intended to do so.

The fact was that two sums amounting together to \$100,000 had been borrowed by Travers from the Trusts and Guarantee Company on the security of promissory notes made by applicants for shares which had been indorsed to him by the provisional directors for the express purpose of raising money to be used in making the deposit, as appears from the following resolution passed by the provisional directors on the 8th October, 1906:—

"That the provisional directors execute a power of attorney to W. R. Travers for the purpose of endorsing all notes in their names as provisional directors and of signing their names to a note or notes for the purpose of raising funds to put up the deposit with the Government, and we authorize the secretary to hand over all notes to W. R. Travers for the said purpose."

Acting under the authority of this resolution and armed with a power of attorney from the provisional directors to him, dated the 8th October, 1906, Travers, on the ninth day of October, 1906, borrowed from the Trusts and Guarantee Company \$80,000, repayable in a month, on the security of promissory notes of subscribers amounting in the aggregate to \$100,955, agreeing to pay interest on the loan at the rate of 10 per cent. per annum and a bonus of \$1,000, and on the twenty-third day of October, 1906, he borrowed from the same company \$20,000, repayable on demand on the security of promissory notes of subscribers amounting in the aggregate to \$26,500, and certain shares of loan companies, valued at \$20,500, which had been transferred to the bank in payment of subscriptions, agreeing to pay the same rate of interest and a bonus of \$500.

For the loan of \$80,000, the Trusts and Guarantee Company issued its cheque on the Bank of Montreal payable to the order of that bank "For credit of the Farmers Bank of Canada with the Finance Minister and Receiver-General," and for the loan of \$20,000 the company issued its cheque on the Ontario Bank payable to the order of the Bank of Montreal, for "credits Farmers Bank of Canada with Finance Minister and Receiver-General."

The form was then gone through of crediting the proceeds of these loans, to the extent of \$75,995, as payments on the shares of certain of the applicants for shares, as shewn on pp. 40 and 41 of exhibit 63, and to the extent of \$20,027 in substitution for securities which had been taken in payment for shares and were held by the provisional directors, and the latter sum was treated as having been paid in cash; the balance of the loans was used to cover in part expenses of organization which were not carried into the books of the bank until some months after it began business. \$17,595 was placed to the credit of subscribers other than those whose promissory notes had been used for the purpose of obtaining the loans, and who had actually paid nothing

on account of their shares, and in many cases subscribers' notes for much larger sums than were placed to their credit were pledged for the loans.

Although the form of applying the money borrowed in the way I have indicated was gone through, the real purpose of the transaction was to enable Travers to represent to the Treasury Board that a much larger sum had been paid in than had actually been received on account of the shares, and Travers intended that as soon as the deposit of \$250,000 was returned to the bank the loans should be paid off and the subscribers' notes be discounted in the various offices of the bank, and that was in fact done, about \$60,000 having been repaid in December and the remainder in the March or April following.

That in thus dealing with these notes the provisional directors and Travers were guilty of a breach of trust does not, I think, admit of doubt, and for the manner in which the money borrowed was applied there was neither justification nor excuse.

When the Finance Minister, as I shall refer to more fully later on, raised the question as to whether money had been borrowed to make up the \$250,000 deposit, and in his letter to Travers, of the 30th November, 1906 (exhibit 5, p. 36), asked for an assurance from him that notes of subscribers who had not actually paid in cash but had given notes to the provisional directors had not been used to raise the money, Travers' letter in reply (exhibit 5, pp. 36-37), while it was intended to appear to give the assurance for which the Minister had asked, did not do so; his letter was a brief one and was confined to the statement that the provisional directors had not raised the money in the way mentioned by the Minister, and the further statement that the Minister would find the statement that had been put in "absolutely correct as to the amount of stock subscribed and the amount paid up." These statements, though possibly literally true as Travers understood the transaction with the Trusts and Guarantee Company, which was that the loans were personal loans of his own, were, in fact, untrue, and the language used in his letter was deliberately chosen by Travers in order to make it appear that he was giving the assurance for which the Minister had asked, while he was in fact not doing so and could not truthfully do so.

My conclusion on this branch of the inquiry is that the Treasury Board was induced to give its certificate by false and fraudulent representations on the part of Travers, and that if the facts I have mentioned as to the way in which the \$250,000 was made up had been disclosed, the certificate of the Treasury Board would not have been given.

It is plain from the letter of the Finance Minister to Travers, of 30th November, 1906, that the minister understood that sec. 13 of the Bank Act would not have been complied with if the \$250,000 was made up wholly or in part of money raised on promissory notes given by subscribers for shares to the provisional directors, and that he would have felt it his duty to recommend that the certificate should not be granted if he had known that part of the money had been raised in that way.

That that information had been given to the Minister before the certificate was issued appears from the testimony of Sir Edmund Osler and Mr. David Henderson and is shewn by the letter of the 19th October, 1906, of Mr. Leighton McCarthy to the Minister, which appears in exhibit 5, pp. 2, 3. In that letter Mr. McCarthy states as follows:—

“I have received information that the alleged subscribers for shares paid a large sum of money in cash and have signed notes for other large sums of money and that the persons professing to act in the name of the bank have transferred notes and received the proceeds and that a deposit either has been or will be made of the cash received and the proceeds of these notes or sufficient amount to make up \$250,000.”

That the verbal information I have mentioned was conveyed to Mr. Fielding was not denied, though he stated that, as I have no doubt was the fact, no formal objection to the granting of the certificate was made either by Sir Edmund Osler or by Mr. Henderson. That, however, in my opinion, is immaterial.

I do not suggest that the Minister would have been justified because of the information conveyed to him in recommending that the certificate should not be granted, or that the Treasury Board because of it would have been justified in refusing to grant it, but, having received the information, it was in my opinion incumbent on the Treasury Board to have investigated the charges that had been

made before coming to a conclusion as to whether or not the certificate should be given.

The officials of the Department of Finance appear to have treated Mr. McCarthy's letter as if it had never existed, and, in my opinion, in that they erred, for, although Mr. McCarthy on the 2nd November, 1906, wrote to the Minister informing him that the claims made by his clients had been "settled by their subscriptions being taken up by some parties interested in the bank and refunding the money paid by the individuals or returning the notes which had been given," and had withdrawn the objections which he had made on behalf of his clients to the issue of the certificate, Mr. McCarthy did not in any way intimate that the information he had conveyed to the Minister as to the way in which the \$250,000 had been made up had been found to be incorrect.

Although the information which had been conveyed to the Minister had evidently impressed him with the necessity for further inquiry on his part before advising that the certificate should be given, the only inquiry made was that contained in his letter to Travers, of the 30th November, 1906, to which reference has been made, and strangely enough in that letter what is said to have led to the inquiry is stated, not, as one would have expected, that information of the character mentioned in the letter had reference to the application of the Farmers Bank, but that it had reference to previous applications where it is said the application was in all respects apparently regular.

As I have already pointed out, Travers in his reply did not give the assurance for which the Minister had asked, viz., an assurance that nothing of the kind had taken place in relation to the subscriptions for the Farmers Bank, but that the amounts set forth in the application as having been paid up have in every case been bona fide cash payments.

Unfortunately, Travers' reply appears to have been treated by the Department as containing the assurance for which the Minister had asked.

I very much doubt whether in the circumstances it would have been right to have depended upon the word of Travers, even if he had given the assurance for which the Minister had asked. The information which had been conveyed to the Minister had come from gentlemen of standing,

and if it was accurate the declaration that Travers had made was untrue and it would seem to have been almost an idle thing to ask for an assurance that there was no foundation for the statements that had been made to the Minister from the very man whose honesty was in question and unwise to have acted on that assurance.

It is true that, as Mr. Fielding stated in evidence, Travers, so far as he knew, was a reputable banker; but that was not, in my opinion, a sufficient reason for not having instituted an inquiry as to the matters which had been called to his attention. Such an inquiry could easily have been made, and the delay occasioned by it would have been inconsiderable, and such an inquiry would, undoubtedly, have resulted in the discovery of the manner in which the \$100,000 had been raised and in the refusal of the Treasury Board to give the certificate.

An unsuccessful attempt was made to shew that money had been used by Travers to procure the issue of the certificate. In support of it Travers testified to the issue of a cheque for \$3,000 which he said was placed in an envelope addressed to Mr. Peter Ryan, and sent to Mr. Ryan's room in the Russell House, at Ottawa, and afterwards presented and cashed.

That Ryan received this cheque or had any connection with it, if it was used for the purpose stated by Travers, was disproved.

There is, in my opinion, no ground for supposing that any improper influence was used to induce the Treasury Board to give the certificate or to induce the Minister of Finance to recommend the granting of it, and the most that can properly be charged against the Department of Finance or the Treasury Board is an error of judgment.

It was argued before me that there was a duty resting upon the Department of Finance upon receipt of the letter of the President of the Canadian Bankers Association (Mr. Clouston) (exhibit 28), which reached the department after the certificate of the Treasury Board had been given, to have taken steps to recall it, but I am not of that opinion and know of no power in the Department or in the Treasury Board to recall a certificate.

It is to be observed that this letter contained no further information than already had been communicated to the

Minister of Finance by Sir Edmund Osler, Mr. Henderson and Mr. McCarthy.

It was unfortunate, I think, that the information conveyed to the Minister of Finance by Sir Edmund Osler and Mr. David Henderson as to the way in which the money deposited by the bank had been raised, if it was intended to prevent the issue of the certificate, was not conveyed to the Minister in writing, and it may be observed as probably indicative of their view as to the gravity of the irregularities of which they had been informed, that neither of them, though both were members of the House of Commons, when the fact that the certificate had been given came to his knowledge, called in question in the House the action of the Treasury Board or made the granting by it of the certificate the subject of inquiry.

The action of the Canadian Bankers Association in receiving, as it was said it had done, the Farmers Bank into the Association, was questioned by Mr. Fielding in his testimony before me, but his criticism was based upon an erroneous assumption as to the power of the Association to exclude from membership. On reference to the Act of Incorporation of the Association, 63-64 Vict. ch. 93D, it will be found that it had no such power, and that on the Farmers Bank becoming entitled to carry on the business of banking in Canada it became ipso facto a member of the association.

I was asked by the representatives of the shareholders and depositors to find that there was "neglect of duty on the part of the Finance Department after the" receipt of the letter of the 17th April, 1907, from Mr. G. Vankoughnet, the manager of the bank at Milton, addressed to the Deputy Minister of Finance (exhibit 5, p. 29), and informing him that promissory notes given in payment for shares were being discounted at the bank's branches and the proceeds credited to the head office, which included them in its returns as paid-up capital and issued circulation accordingly.

In consequence of this letter, the Department, on the 2nd May, 1907, called for a special return shewing (1) what part of the \$375,473 paid-up capital, as shewn by the return of 30th March, 1907, was represented by promissory notes or other obligations of shareholders or the proceeds of the same of which the bank was the holder or liable on, and (2) the names and holdings of stock of such shareholders with particulars of such notes or obligations as were then current.

The return asked for was made a few days afterwards. It appears on pp. 35 and 36 of exhibit 5, and shews that promissory notes amounting in the aggregate to \$59,110 given by shareholders having shares of the aggregate par value of \$92,700, were included in the \$375,473, and were held by the bank, and no further action was taken by the Department.

I am unable to find that in this there was any neglect of duty on the part of the Department, or to see that anything more than was done could have been done, even if Mr. Vankoughnet's letter had stated, which it did not, that the promissory notes he referred to were notes that had been given in respect of shares included in the list furnished to the Department when the application for the issue of the certificate of the Treasury Board was made.

Notwithstanding the irregularities on the part of Travers and his misconduct in connection with the application for the certificate, which I have mentioned, the evidence satisfies me that if the bank had been prudently and honestly managed there is no reason why it should not have succeeded. The promissory notes that had been given by subscribers were for the most part good and were subsequently paid, and while it is true that if the certificate of the Treasury Board had not been granted the money of the shareholders and depositors would not have been lost, the efficient cause of that loss was the recklessness and fraud of those entrusted with the management of the bank, and not the granting of the certificate.

One of the first acts of Travers after the certificate had been obtained, was to cause a fraudulent entry to be made in the books of the bank as to the expenses incurred by the provisional directors, by writing down the amount of them, which was at least \$46,543.71, to \$32,127.71, the difference being concealed by treating as cash on hand three sums of \$3,000 each, represented by cheques and obligations of persons who had subscribed for shares which had not been, if they were to be so treated, credited to capital account, and taking the remaining \$3,978 and the \$1,500 bonus paid to the Trusts and Guarantee Company, less \$62 received from other sources, out of the money borrowed from the Trusts and Guarantee Company.

The subsequent management of the affairs of the bank was characterized by gross extravagance, recklessness, incompetency, dishonesty and fraud, and has resulted in the entire loss of the paid-up capital and the whole of the deposits, and that after allowing for all that can be extracted from the shareholders on their double liability, a loss amounting to no less than \$1,806,437, making a record unparalleled in the history of any bank of Canada, or, as far as I am aware, in any other country.

It is unnecessary to do more than state in general terms in what way these losses were incurred, as full particulars of them will be found in the carefully prepared and exhaustive statements of the liquidator, Mr. Clarkson, which accompany my report, and in which will also be found a history of the Keeley Mine transaction, in which a loss approximating \$500,000, as afterwards mentioned, was sustained by the bank.

Subject to deductions in respect of some of the items of sums amounting in the aggregate to \$42,377, during the short career of the bank, the bad debts amounted to \$598,565; the operating losses, including the cost of printing bank notes and stationery, to \$281,119; the organization expenses, to \$87,279; the sums stolen by officers of the bank, after deducting what has been and is expected to be recovered from sureties, to \$134,118; the dividends paid, to \$50,772; the losses on expenditures on bank premises, fixtures and furniture, to \$108,801; the loss on the purchase of the Keeley Mine, to \$509,886, from which, however, is to be deducted what may ultimately be realized from the sale of it; loss on the purchase of stock in the Keeley Mine Company, \$15,000; besides other losses amounting in the aggregate to approximately \$63,274.

The amount of the capital subscribed and paid up and the extent of the liabilities and the value of the assets of the bank appear in a statement prepared by Mr. Clarkson, which is annexed to my report, and is marked exhibit 96.

Before concluding my report, it seems to me proper to mention some matters as to which evidence was adduced, and which have formed the subject of public discussion, and to state my conclusions as to them.

It was shewn that the World Newspaper Printing Company had a credit with the bank for a considerable sum, and that money was kept on deposit at the bank bearing interest

by the Treasurer of Ontario, and it was alleged that the credit was given by Travers on the understanding or agreement that in consideration of it being given the company should use its influence with the Provincial Government and its Treasurer, to induce them to make deposits with the bank, that the company did use its influence to that end, and that its efforts resulted in the deposits that were made by the Treasurer or some of them being made.

Most of the transactions between the company and the bank were carried on on behalf of the company by Mr. Greenwood, who was its managing director.

Mr. Greenwood was a witness upon the inquiry, and correspondence between him and Travers and between him and the Provincial Treasurer was put in evidence.

My conclusions as to these matters are:—

1. That while it is probable that Travers thought that the giving of the credit which he gave to the company would result in such influence as the company could bring to bear upon the Provincial Treasurer to induce him to make deposits with the bank being used, and that Greenwood knew that Travers so thought, and promised to use that influence, there was nothing in the nature of an agreement that as a consideration for giving the credit it would be used, and there is no reason for thinking that had the promise not been made the credit would not have been granted.

2. That if any such promise was made it was not communicated to the Provincial Treasurer, and that he was not made aware that it had been made, and that in making deposits with the bank he acted with nothing in view but the public interest, and the making of a fair distribution of Government deposits between the banks carrying on business in Toronto.

I may add that since the inquiry was entered on the whole of the indebtedness of the company to the bank has been paid.

It is proper also to say, in conclusion, that Travers appears to have thought the Keeley mine a property of immense value, and that by the sale of it all the losses which had been incurred would be met, and that he appears to be still of that opinion.

All of which is respectfully submitted.

W. R. MEREDITH,

Commissioner.

Toronto, 21st February, 1913.

SOME EARLY LEGISLATION AND LEGISLATORS IN UPPER CANADA.

BY THE HONOURABLE MR. JUSTICE RIDDELL, L.H.D.,
LL.D., &c.

Third Paper.

The third session of the first Parliament began June 2nd and lasted till July 7th, 1794.

The first chapter of the legislation of this session regulated juries to be called to "serve on trials at any Assizes or Nisi Prius, Quarter Sessions or District Court." Not less than 36 nor more than 48 jurymen were to be returned in any District or place; those returned, if they did not appear, were to pay a fine not less than 20 shillings (\$4) or more than £3 (\$12). Section 9 provided that every jurymen should receive one shilling from the plaintiff or his attorney in every cause in which he was sworn—if a view should be allowed, six jurymen agreed upon or named by the Judge or some officer of the Court had the view and were allowed each 10 shillings for each day they were so employed. The Court of King's Bench was authorized to order a special jury to be struck as in England, the fee of each special jurymen to be 5 shillings.

Chapter two established a Court of Law by the name and style of His Majesty's Court of King's Bench for the Province of Upper Canada, with the same authority as the Courts of King's Bench, Common Pleas and Exchequer in England.

Before the conquest of Canada, of course the French system of Courts was the only system in Canada. From this time until the Royal Proclamation of 1763, there were Courts presided over by the captains of militia. These Courts were set up by the conquerors as part of their military rule, and could only be temporary.

By the Proclamation of 1763, it was provided that the Governor should have the power of constituting Courts of Law and Equity with civil and criminal jurisdiction to hear and determine causes as near as may be agreeable to the laws of England. Murray, accordingly, pursuant to his instructions and his Commission, established a Court of King's Bench with civil and criminal jurisdiction with an appeal to the Governor in Council or to the King in certain cases—the Court to sit

twice a year, in January and June, in Quebec, and a Court of Assize and Gaol Delivery once a year in Montreal and Three Rivers. A Court of Common Pleas was also established,—an appeal lay to the King's Bench, or if of sufficient importance to the Governor in Council or the King. Justices of the Peace were also appointed with civil jurisdiction up to £5 for a single magistrate or £10 for two sitting together. Three justices could hold a Court of Quarter Sessions with civil jurisdiction from £10 to £30.

Several departures from English precedent are manifest. The Common Pleas administered Equity, and Conservators of the Peace both singly and in the Quarter Sessions had civil jurisdiction.

Then came the Quebec Act of 1774, 14 Geo. III., ch. 83. This revoked the Proclamation of 1763, all ordinances relative to the administration of justice and all commissions to Judges, etc., made or issued under the authority of the Proclamation. It further provided for the King constituting Courts of civil, criminal, and ecclesiastical jurisdiction and appointing Judges and officers thereto.

The American invasion of Canada prevented anything being done at the time—*inter arma silent leges*—but in 1776, Courts were established for the Districts of Montreal and Quebec, and a Court of Appeal was also constituted. Courts were organized for Three Rivers, and afterwards, when in 1788, Dorchester divided what was afterwards Upper Canada into Districts, Courts were instituted also in these four Districts, *i.e.*, Lunenburg, Mecklenburg, Nassau and Hesse (this last including Detroit). These were Courts of Common Pleas. Commissions of Oyer and Terminer were also issued to the Judges of these Courts, as occasion required.

Jury trial having been established by chapter 2 of 32 George III., chapter 4 of the same statute abolished summary proceedings in these Courts, which had formerly obtained in cases involving less than £10 sterling.

The time was now come to abolish these Courts of Common Pleas in Upper Canada, and chapter 2 of the third session became law. This constituted a Court of King's Bench, with a Chief Justice and two Puisné Justices (increased to four in 1837 by 7 Wm. IV., ch. 1) to sit at a place certain, *i.e.*, at the place where the Governor usually resided, and until such place should be fixed, at the last place of meeting of the

Parliament. Four terms were prescribed; the first and original process directed to be a writ of *capias ad respondendum*; special bail also provided for, and the statutes of jeofails, etc., as in England, notice of trial, examinations *de bene esse*, costs, etc. The Courts of Common Pleas disappear and their records become records of the King's Bench. A Court of Appeal was constituted (composed of the Governor or Chief Justice and two or more members of the Executive Council) to which an appeal lay in matters over £100; and a further appeal when the amount in controversy exceeded £500 sterling was reserved to the Privy Council.

As indicating the nationality of the inhabitants of Upper Canada it may be mentioned that the notice to the defendant to be endorsed on the writ was required to be in French (according to the form given) when the "party defendant is a Canadian subject by treaty or the son or daughter of such Canadian subject": sec. 9.

This Court of King's Bench (becoming in 1839 by 2 Vic. ch. 1, Queen's Bench) continued until, in 1881, it was consolidated in the Supreme Court of Judicature. The former Courts of Common Pleas entirely disappeared in 1794, and the Court of Common Pleas created in 1849 has no relation to these whatever. In 1837 a Court of Chancery was established, presided over by the Vice-Chancellor of Upper Canada; and in 1849, 12 Vic. ch. 63, a new Common-law Court, the Court of Common Pleas, with the same jurisdiction and practice as the Court of Queen's Bench. At the same time the Court of Chancery was reconstituted with a Chancellor and two Vice-Chancellors, 12 Vict. ch. 64. These three Courts continued side by side as the Superior Courts of original jurisdiction until 1881.

By the Act of 1794, as we have seen, the Lieutenant-Governor of the Province or the Chief Justice, with two or more of the Executive Council, constituted a Court of Appeal from the King's Bench, and the same Court became the Court of Appeal from Chancery in 1837; but in 1849 this Court of Appeal was abolished and a new Court of Error and Appeal was constituted to hear appeals from both the Common-law Courts and the Court of Chancery. This new Court was much like the Court of Exchequer Chamber in England, and consisted of all the Judges of the three Courts of first instance. In 1874, 37 Vic. ch. 7, this Court was reconstituted and thereafter consisted of Judges permanently

of the Court of Appeal. In 1881, 44 Vic. ch. 5, the former system was abolished; all the Courts, Appeal, Queen's Bench, Chancery and Common Pleas, were united and consolidated into one Supreme Court of Judicature for Ontario, composed of two permanent divisions: 1, The Court of Appeal for Ontario (this had five Judges), and, 2, the High Court of Justice for Ontario: and of this High Court of Justice there were the three divisions, *i.e.*, the Queen's Bench, Chancery and Common Pleas Divisions. Later, another division was added in the High Court, *viz.*, the Exchequer Division. Each of these divisions of the High Court of Justice had three Judges. The still recent reform effected by the Law Reform Act, 1909, need not here be considered.

I shall in a subsequent paper speak of the defects of the original Court. It may here be said, however, that William Dummer Powell, who had been commissioned as Judge of the Court of Common Pleas for the District of Hesse, and had actually sat as such at L'Assomption (Sandwich), became after the passing of this Act a Justice of the Court of King's Bench, and was afterwards, in 1816, created Chief Justice.

As the Courts of Common Pleas were abolished, it became necessary or at least advisable to constitute Courts to take their place for the trial of causes involving small amounts. In the Legislative Council, Cartwright and Hamilton caused to be entered in the proceedings their formal protest against the one Superior Court rather than Courts of local and exclusive jurisdiction in each District.

A Court was by Chapter 3 constituted in each District, by the name of District Court, to sit where the Court House had been (by 32 Geo. III., ch. 8), directed to be built, except "in the Western District, where the said Court shall be holden in the Town of Detroit." In 1796, by 36 Geo. III. ch. 4, s. 3, it was declared no longer expedient to hold the Court in Detroit, and it was directed to be held at the Parish of Assumption (Sandwich), or nearer the Isle of Bois Blanc—in 1801, by 41 Geo. III., ch. 6, s. 2, the place was definitely fixed at Sandwich.

The District Courts were given jurisdiction in all actions of contract from 40 shillings up to £15; this was in 1797, by 37 Geo. III. ch. 6, sec. 1, increased to £40, in cases of contracts where the amount is liquidated, and to £15 in trespass where the title to land was not brought in question.

After several amendments, the legislation was consolidated in 1822 by 2 Geo. IV., Sess. 2, ch. 2, and again with amendments in 1845 by 8 Vic. ch. 13. At length in 1849 the Districts became so multiplied that their boundaries in many cases became identical with the boundaries of Counties, and the Statute 12 Vic. ch. 78, abolished the division of the Province into Districts for judicial and other purposes and the District Courts were made County Courts by sec. 3. In the Statutes for that year they are called sometimes County Courts, sometimes District Courts, and sometimes District or County Courts, but thereafter the new name, which still continues, is consistently used.

Chapter 4 authorized the Governor to grant a license to any number of His Majesty's liege subjects not exceeding sixteen, to act as attorneys and advocates in the Province. The reason for this was the scarcity of lawyers acquainted with the English Civil law in the Province. Before 1792 of course the English Civil law had not been in force, at least in theory. This Act of 1794 suspended for two years for Upper Canada the ordinance made in Quebec in 1785 providing for the profession. The Act was not abused—only some five gentlemen were licensed under it in 1803, one being D'Arcy Boulton, an English barrister who afterwards became Judge of the King's Bench, and the ancestor of a distinguished family; another, Dr. William Warren Baldwin, a prominent barrister and politician, and the father of the still more celebrated Robert Baldwin.

The formation of the Law Society of Upper Canada in 1797 we shall have occasion to note when we reach that date.

Chapter 5 provided for the accounting for all fines, etc.

Chapter 6 was an assessment Act of no great consequence except that it ordered the payment in full of the wages of the members of the Assembly.

The Militia received attention in chapter 7, which authorized Cavalry and a Navy.

Chapter 8 enabled the householders of every District at their annual town meetings to determine in what manner and at what periods horned cattle, horses, sheep and swine, or any of them, should be allowed to run at large, and permitted impounding of the offending animals.

Chapter 9 amended the Act of the previous session as to highways, and was equally futile.

Chapter 10 allowed the inhabitants of the Eastern District to build a gaol (it is called in the Statutes a "goal") and Court House in Cornwall, as well as those in New Johnstown authorized by the Act.

Chapter 11 laid a duty on "Stills for the purpose of distilling spirituous liquors for sale," 1 shilling and 3 pence per gallon of the capacity of the still. The owner must procure a license, paying a fee for it of course; no one could do anything in those days without paying a fee for it—except (possibly) die.

Chapter 12 regulated the manner of licensing public houses, requiring the keeper to procure a certificate of his fitness from the magistrates of the District—the magistrates were given the power to limit the number of inns and the names of all licensees were to be published in the *Upper Canada Gazette*.

A bill to regulate the practice of physic and surgery passed the Assembly, but the Council amended it in such a way that it did not suit the Assembly; a conference was directed to be held, but nothing seems to have been done, and the bill did not pass this year. It had better luck the following session, 35 Geo. III. ch. 1.

In the Council during this session the following Councilors are noted as taking part: Osgoode, Baby, Hamilton, Cartwright, Munroe, Grant, Russell and Aeneas Shaw, who presented his summons and was sworn in, June 10, 1794. He was a Scotsman, the lineal descendant of Macduff, first Thane of Fife: of great mental and bodily vigor, he served in the Revolutionary war, and was created a Major-General in Upper Canada. At his house, Oakhill, he entertained the Duke of Kent, father of Queen Victoria, during his tour in Canada in 1799. The Major-General died in 1813 during the war with the United States, it is said from over-fatigue.

We have not the complete record of the Assembly of this Session in full—the only available copy extending only to June 11th; in what is preserved, I find the names of twelve members mentioned as taking part—Speaker Macdonell, Hugh Macdonell, Alexander Campbell, Ephraim Jones, John White, Joshua Booth, Hazelton Spencer, Benjamin Pawling, Isaac Swayzie (this name is spelled Swayzé in the report), Parshall Terry, David William Smith; no trace is found of Jeremiah French, Peter Van Alstine, Nathaniel Pettit or

William Macomb, although they all may have been in attendance.

Fourth Paper.

The fourth session of the first Parliament also met at Newark like its predecessors; it lasted from July 6th to August 10th, 1795. We have no records of the proceedings except the statutes themselves.

The first chapter regulates the practice of physic and surgery. I have thus spoken of it in a paper prepared for the Ontario Medical Association, and published in the "Canadian Journal of Medicine and Surgery," September, 1911:—

"At the time of the separation of our Province, and for some time thereafter, there was no regulation as to who should practice medicine, or "physic," as it was called. Many of the practitioners were old army or navy surgeons; some were importations from the United States, but most of those who treated disease were mere empirics. There had, indeed, been an Act or Ordinance passed by the Council of the old Province of Quebec in 1788, forbidding anyone to practise without a license from the Governor—which license was to be granted without an examination to all graduates of any British university and to all surgeons of the army or navy; but this was largely a dead letter in the newer parts of the colony, as our country was at that time.

In 1795 the Provincial Parliament of Upper Canada passed an Act, 35 Geo. III. ch. 1, forbidding the sale of medicine, prescribing for the sick and the practice of physic, surgery or midwifery by anyone who had not been licensed. The Governor was to appoint a board to examine all who should apply for a license, and those approved of by the Board, upon the examination were to be granted a license, the fee being £2 currency, i.e., \$8. A penalty of £10, i.e., \$40, was imposed for selling medicines, prescribing for the sick or practising physic, surgery or midwifery without a license. An exception was made for surgeons or surgeons' mates in the army or navy, and for those who had been practising at the time of the passing of the Act of 1791; these, however, were not to take apprentices or students. There is no record of anything ever having been done under these provisions; the Act was

found unworkable, and it was accordingly repealed in 1806 by 46 Geo. II. ch. 2, and the profession was again much at large, although the Act of 1788, already spoken of, was still nominally in force. Much public dissatisfaction was the result, and at length a new Act was passed in 1815, 55 Geo. III. ch. 10, which forbade prescribing for the sick or the practice of physic, surgery or midwifery without a license—saving the case of graduates of a university in British Dominions, surgeons and surgeons' mates in the British Army or Navy, and those who had practised before 1791. The prohibition against these taking apprentices or students was not repeated in this Act, nor was the prohibition against selling, etc., medicines. And it was expressly provided that women might practise midwifery without a license. The Governor was to appoint an examining and licensing Board.

Nothing seems to have been done under this Act either, and it was repealed in 1818 by 59 George III. ch. 13, which, however, contained much the same provisions."

I do not here trace the legislation further.

Chapter 2 prohibited any person coming from any place not within his Majesty's Dominions at the time of the passing of the Act, and not being a *bona fide* subject of His Majesty for seven years before the passing of the Act, from voting for a member of the House and from being a candidate. This was to meet what was then and for some years thereafter a very real danger. Americans coming into Upper Canada, with a hatred of monarchical institutions, obtruded themselves among the voters, preached, and, where they dared, practised disloyalty.

Chapter 3 ratified an agreement entered into with Commissioners from Lower Canada as to the division of certain duties, and an agreement that the Upper Province would not impose duties upon goods imported into Lower Canada and passing into Upper Canada, receiving one-eighth of the duties levied thereon by Lower Canada.

Chapter 4 gave jurisdiction to the Court of King's Bench similar to that of the Court of Exchequer in England in the case of goods seized or contraband. This jurisdiction proved of very great value: the old term books are full of cases of confiscation of goods seized as being smuggled.⁷

⁷ For example, we find in Michaelmas Term, 49 Geo. III., Nov. 14th, 1808, before Scott, C.J., and Powell, J.: In "*The King v. John Young*, on the information of Wm. Frith, Esquire, Atty.-Gen'l, proclamation is made in open Court for condemnation of goods

Chapter 5 is the first of our Registry Acts, establishing a registry office for each county and riding. Memorials only were to be registered, not the deed, etc., itself.

The fifth and last Session of this Parliament met May 16th, and lasted till June 3rd, 1795. No records of the proceedings other than the Statutes are extant.

Chapter 1 regulated the weight, etc., of coins and their rating as legal tender.

British Guinea . . . weighing 5 dwt. 6 gr. Troy=£1 3s. 4d.

Johannes of Portugal..weighing 18 dwt. 6 gr.

Troy=£4 0s. 0d.

Moidore of Portugal..weighing 6 dwt. 18 gr.

Troy=£1 10s. 0d.

The milled Doubloon or four Pistole piece of

Spain weighing 17 dwt. Troy=£3 14s. 0d.

The French Louis d' or (before 1793) . . . weigh-

ing 5 dwt. 4 gr. Troy=£1 2s. 6d.

Etc., Etc.

American Eagle..weighing 11 dwt. 6 gr. Troy=£2 10s. 0d.

American Dollar =£0 5s. 0d.

Many other gold and silver coins are named and valued. The value of the American dollar shews that in Canadian currency 1 shilling=20 cents (what was known even in my day as Halifax currency).

Counterfeiting was made felony, punishable with death on conviction "in His Majesty's Court of his Bench." Uttering, for a first offence, one year's imprisonment and one hour in and upon the pillory in some public and conspicuous place; a second offence was punishable with death as a felon without benefit of clergy. Importation of false coin was to be punished by twelve months' imprisonment.

No one was to be compelled to take more than 1 shilling in copper; every payment exceeding £50 currency in gold coin was to be by weight. The Quebec Ordinance of 1777 was repealed. I shall speak of this more at length later on.

seized as forfeited. The Atty.-Gen'l suggesting that it is his intention, on the part of the Crown, to take the goods in specie, this, on proclamation, is, by the Court, considered deficient." Trinity Term, 50 Geo. III., July 11th, 1810. proclamations were made for condemnation of goods seized as forfeited: 106 gals. of brandy, 75½ gals. of rum, 1,000 lbs. of tobacco, 60 lbs. of tea, 50 lbs. of tobacco, called pegan, 88 lbs. of snuff, and 50 lbs. of cotton wool; also 226 gals. of whiskey, 1,600 lbs. of pork, 120 gals. of gin, and the boat tackle and furniture. In Michaelmas Term the proclamations were renewed and, finally, judgment was given for forfeiture.

Chapter 2 provided for juries at the assizes.

Chapter 3 made further provision for licensing inn-keepers.

Chapter 4 altered the place of meeting of the Quarter Sessions and the District Court of the Western District from Detroit, as has already been stated. Detroit was definitely abandoned by the British the following year, under the provisions of "Jay's Treaty," 1794.

Chapter 5 abolished the bounty for killing bears. Chapter 6 provided for Commissioners to treat with Commissioners from Lower Canada as to duties, etc., and chapter 7 further secured these "wages," so often spoken of.

This is the by no means discreditable or insignificant record of the first Parliament of Upper Canada, the only Parliament under Simcoe.

I shall now say something as to some of these statutes.

There was very great reason for the protest of Cartwright and Hamilton. They had caused to be entered upon the proceedings of the Council 3rd June, 1794, a formal protest against the proposed Act which effected the abolition of local Courts, in the geographical situation of the colony, "with a thin population scattered over so immense an extent of country"—all writs issuing from the "fixed place" at which the Court sat, and all proceedings to be there filed. It was indeed provided that where the first process went to the Sheriff of the Home District, fifteen days should elapse between the teste and return, forty days in any other District. But the necessity of "days' journeys" in procuring process, etc., must in then condition of the colony have been very annoying; and many must have wished the return of the old Common Pleas Court in their District. But in 1797, by 37 Geo. III. ch. 4, it was provided that the Clerk of the Crown and Pleas should have in every district an office and a deputy whom he should furnish with blank writs, and in which office pleadings should be filed; moreover, a form of writ where special bail should not be required was given. This was made quite clear in 1845 by Statute 8 Vic. ch. 36; it was enacted that the Clerk of the Crown should supply his deputies in every district with writs of *mesne* and final process, except writs in ejectment, and the deputies were directed to issue such writs in the same manner as might be done in the principal office at Toronto. They were also authorized to issue rules upon the Sheriff for return of *mesne* or final process. Then in 1849, the Act 12 Vic. ch. 63

altered the office of Clerk of the Crown and Pleas, and made the several Clerks of the County Courts *ex-officio* Deputy Clerks of the Crown and Pleas in the Queen's Bench and Common Pleas—so that at length there was in each county town an office where process could be sued out. Thus, most of the advantage of a local Court and all the advantage of a strong central Court were combined.

In the Statute concerning coins, reference is made to standing in the pillory. This time-honored punishment in the English law might be a triumph for the prisoner, or a capital punishment, according to the feeling of the populace. I find instances of the punishment being actually inflicted or at least ordered in Upper Canada, *e.g.*, a case mentioned by Read in his life of Chief Justice Elmsley, page 46; a prisoner convicted at New Johnstown of perjury, Sept. 11th, 1793, was sentenced to be pilloried three times.* The pillory was abolished with us in 1841, by 4 and 5 Vic. ch. 24, sec. 31.

A second conviction for uttering, meant felony "without benefit of clergy." No lawyer is at all likely to think with some popular writers that this means "without the benefit of clerical attention and advice." Of course it originally was the privilege allowed to a Clerk in Holy Orders, when prosecuted in the temporal Courts, of being discharged from such Court and turned over to the ecclesiastical Courts—in other words to get clear almost altogether. This privilege was gradually extended to all who could read, and many a notorious rascal escaped well-merited punishment by reading his "neck-verse," possibly by a recently learned accomplishment. Ultimately, in 1706, by 6 Anne, ch. 9, the privilege was extended to all, whether they could read or not.

* A case well known to all students of the Constitutional History of Canada is the following:—

In Michaelmas Term, 60 Geo. III., Nov. 8th, 1819, *The King v. Bartimus Ferguson*, the prisoner was sentenced to pay a fine of £50, province currency, and to be imprisoned in the common gaol at Niagara for 18 months; in the first of these months he was to stand in the Public Pillory between the hours of 10 a.m. and 2 p.m. At the expiration of the term he was to give security for good behaviour for seven years himself, in £500, and two sureties in £250 each, and to be imprisoned until the fine was paid and security given.

(Present: Powell, C.J., Campbell and Boulton, JJ.)

The prisoner's counsel was Mr. Thomas Taylor, the reporter and editor of Taylor's Reports, called in Hilary Term the same year. He himself was the editor of the Niagara Spectator, and in his journal, in his absence from home, had appeared a letter written and signed by Gourlay, animadverting on the Administration of the day. Ferguson was indicted for libel, and found guilty, with the result we have seen. On his making a humble submission, he was relieved of some part of the penalty and imprisonment.

This privilege did not extend to all felonies, but only to capital felonies, and even of these some were "without benefit of clergy"; moreover, by an early statute (1488), 4 Henry VII., ch. 13, laymen allowed their clergy were burned in the hand, and could not claim it the second time, and the practice grew up of imprisoning for life clergymen where the offence was heinous and notorious.

"Benefit of Clergy" was abolished in England by sec. 6 of the Criminal Law Act of 1827, and in Upper Canada in 1833 by 3 William IV., ch. 3, sec. 25. This Act provided that all crimes made by the Act itself punishable with death—murder and accessory before the fact to murder, rescue of one committed for or found guilty of murder, rape, carnal knowledge of a girl under ten, sodomy, robbery of the mail, burglary, arson, riot after the reading of the Riot Act, destruction of His Majesty's dockyards, etc. (a sufficiently long list indeed)—should be so punished, but that all other felonies should be punishable by banishment or imprisonment for any term not exceeding 14 years. Thus the counterfeiter escaped the punishment of death, to the great grief of many very good and very intelligent people who thought that a death sentence for the offender was the only safeguard for society.

Simcoe returned to York at the close of the fifth Session; a short time after his arrival, he received an answer to his request of the previous December for leave of absence on the ground of ill-health. His request was granted in most flattering terms. Causing Peter Russell to be sworn in as Administrator, he left York for Quebec, and thence sailed for London in September, 1796, never to return. After effective service in the West Indies, he died at Exeter in 1806.

A man of great force of character, a devoted patriot, holding his Church entitled to loyalty less only than his King, a soldier of valor and capacity, his mistakes were for the most part the mistakes of his time and his rank, and he well deserves the encomium of his epitaph in Exeter Cathedral, that "in his life and character the virtues of the hero, patriot and Christian were eminently conspicuous."

Of the Executive Council I have said little; that body took no part in legislation. All its members, however, were Legislative Councillors.

In the Houses, even at this early date, we see differences of opinion, the Council inclining to the aristocratic, the Assembly to the democratic view. The embryo of an opposi-

tion also makes its appearance, even in the select body. Hamilton and Cartwright seem to have acted together—we have seen that they joined in a protest against the formation of a great central Court, the King's Bench; Simcoe had no hesitation in calling Hamilton a republican, and Cartwright he thought little, if any better. The custom of dubbing a political opponent a traitor began very early in Upper Canada. Simcoe also intimated that Cartwright's position as Judge of the Court of Common Pleas for his District had something to do with his objection to the abolition of these Courts. However, Hamilton was created Lieutenant of Lincoln, and Cartwright of Frontenac, by the Lieutenant-Governor; so we may judge that his suspicions of their loyalty were but temporary.

This was the only Parliament which met at Niagara—Simcoe had changed the old name into Newark. The first session was held, it is said, in the Freemasons' Hall,* all the others in what Simcoe calls "sheds"—additions built to the Barracks of Butler's Rangers by the garrison.

Simcoe recognized that Newark was too close to the border to be the permanent capital; in 1793 he made a somewhat extended trip into the interior, and decided that a spot at or near to what is now London should be the future capital. In the same year he fixed on Toronto as a suitable place for fortification. He changed its name to York, in consideration and compliment of the Duke of York's victories in Flanders. The Duke of York was a brother of George III., and had, earlier in the year, achieved some success against the French; but he was recalled not long after, and placed in charge at London. He was no great General, but as Administrator he was a success, doing much for the comfort of the soldiers, whether on active service or on pension.¹⁰

* Some say that the first session of Parliament was holden in "a marquee tent, one removed in the scale of ascending civilization from the aboriginal council-lodge," some, that Navy Hall was the scene of the meeting.

William Dummer Powell, Chief Justice of Upper Canada, says, in his MSS. Narrative, now in the possession of his great-grandson Aemilius Jarvis, Esquire, of Toronto, that the House met in canvas houses, which had been prepared for and used by Banks and Solander, in their voyage of discovery, i.e., with Captain Cook, 1768-1771.

¹⁰ Every lover of Sir Walter Scott will remember, in the amusing introduction (1819), to the first edition of the "Legend of Montrose," his description of Sergeant More M'Alpin, who was induced to remain at Gandercleugh when on his way with his sister to Glasgow to take passage to Canada. The Sergeant, an old pensioner, "seldom failed to thank God and the Duke of York, who had made it much more difficult for an old soldier to ruin himself by his folly than had been the case in his younger days."

Dorchester, the Governor-General of Canada, overruled Simcoe's selection of a site for the capital, and chose York, which, with a change to its old name of Toronto in 1834, remained such—with intermittent intervals after the Union of the Canadas in 1841-1842—till the present time.

The second Parliament met at York, not at Newark.

The state of legislation as left by the first Parliament deserves consideration.

The security of the Province from foreign aggression was, so far as was possible, secured by the Militia Acts providing for infantry, cavalry and navy.

Simcoe rather favoured the formation of a hereditary aristocracy who should have the right of being Lieutenants of their counties. This fortunately did not come to pass, but like the provision in the Act, 31 George III., ch. 31, looking to hereditary seats in the Legislative Council, was allowed to pass out of notice. Upper Canada has never been favourable to hereditary titles.

The loyalty of the Members of Parliament was secured by excluding aliens from House and electorate. Payment to members also had been provided for on a moderate but sufficient scale.

The Courts were practically what they are now, with the exception that in civil matters all Judges are now, even in the case of petty claims, trained barristers. The Courts of Requests, presided over by magistrates, corresponded to our Division Courts; the District Court to our County Courts; the King's Bench to the High Court Division of the Supreme Court of Ontario. The ultimate Court of Appeal was then composed of laymen, or it might be so constituted, and this was certainly objectionable—while the Court of King's Bench had the defects already referred to. The English law was introduced, civil as well as criminal.

Standards of weight and measure, coin, legal tender, had been set and fixed, tolls in mills regulated, provision made for killing dangerous wild animals, tavern and distilling licenses had been regulated, former invalid marriages rendered valid, and provision for the future solemnization of marriage made; practitioners in the Courts were also provided for, and physic and surgery not forgotten. In addition to the ordinary Courts of law, a Court of Probate with Surrogate

Courts was provided. The criminal law was not neglected, meetings of the Quarter Sessions were arranged for and Court Houses and gaols directed to be built. A satisfactory adjustment was made with Lower Canada through which practically all imports came, except those from the United States. The curse of slavery was doomed to early extinction—a result in itself well worth all the first Parliament of Upper Canada cost in time, labour and money.

The first foundations of our municipal system were laid—afterwards to play such an important part in our national life. A later Governor called municipal corporations “Sucking Republics”; they are not that, but assuredly they are the very nursery for public spirit and capacity to say effectively what a freeman thinks.

For a beginning, the provision for the registering of documents must be considered creditable. The Registry system now much elaborated has been invaluable in saving trouble and money.

I should not omit the provision for highways. It must be said that highways under local and municipal control have not been a brilliant success. Much of the failure has no doubt been due to the rich soil of a great part of the Province. A reverend gentleman who was stationed at Thornhill in the third decade of the nineteenth century, complained that there were no stones to make a road with.¹¹ It may have been that nothing better could be devised, but there can be no doubt that the roads of the Province have been no credit to us. What could be done by a central authority is seen in what was done. Practically the only roads which deserved the name were those built by the Government—Yonge Street, built by the soldiers, Dundas Street from Burlington Bay

¹¹ “Observations on Professions, Literature, Manners and Emigration in the United States and Canada . . . in 1832, by the Rev. Isaac Fidler, for a short time missionary of Thornhill on Yonge street, near York, Upper Canada, London . . . 1833.”

In this most entertaining volume, written by a clergyman of the Church of England, is found the following:—

“I must here explain . . . that the roads in many parts of Canada are composed entirely of earth, of a rich soil, among which no stones or gravel is intermingled. Many farms along Yonge street, of two hundred acres in extent, have not so much stone on them as would serve to lay the foundation of a house. This is a proof of the fineness of the land; but also of the paucity of materials for making solid and substantial turnpikes. . . . The heavy rains make a road a complete puddle, which affords no sure footing to man or beast.”

Most Upper Canadians have seen such roads; and they are not few or far between now, eighty years after Mr. Fidler wrote.

(Coote's Paradise) to London, and then from Burlington Bay to Toronto, built in the same way; the Danforth Road built on contract by Danforth, an American, in 1799-1800 from York to the Bay of Quinte.

The neglect of municipalities led to the formation of companies to build toll-roads, plank or gravel, of which many were incorporated in the 30's and 40's—and their works do follow them even to the present. Perhaps there is nothing which pays a country better than good roads; and it is to be regretted that for so many years road building was neglected.

But everything cannot be done by a poor country, and perhaps no better solution offered itself to our first legislators. And when all is said, they certainly have earned the admiration and gratitude of all who have lived in the Province since their time.

EDITORIAL.

All communications should be addressed "The Editor" Canadian LAW TIMES, 705 Confederation Life Building, Toronto.

The Editor will be pleased to receive contributions on any subject of legal interest, and will pay for all articles accepted.

The judgment recently given out by the Railway and Canal Commission, consisting of Mr. Justice Lawrence, Mr. Gathorne-Hardy, and Sir James Woodhouse, in the *National Telephone Co., Ltd. v. His Majesty's Post-Master General*, (England), is of peculiar interest at the present moment, when the question of the ownership by the public of public utilities, is one of the moot questions of the day. The judgment will serve as a possible guide in all cases of a similar nature and will be of inestimable value to municipalities the length and breadth of Canada.

The report of Sir William Meredith, K.C., M.G., Commissioner appointed by His Royal Highness, the Governor-General, to make investigation into all material and relative facts in relation to the Farmers Bank of Canada, and its organization and failure, is in this issue of the LAW TIMES, printed in full. A careful perusal of the report will impress upon the mind of every reader the absolute necessity of the appointment of independent Government inspectors, as one of the principal amendments of the new Bank Act. There can be no possible doubt, had the Department of Finance been free to act, when the question arose as to whether money had been borrowed to make up the necessary \$250,000 required by the Government as a deposit, instead of relying upon the word of Travers, an interested party, a Government inspector had been sent to investigate on his own account, the charter of the bank, in all probability, would never have been issued, and the dire calamity to many of the shareholders which subsequently happened would have been avoided.

With the question of taxation everywhere up for discussion, in the Legislature, municipal councils, boards of trade, debating societies, and, in fact, every possible place where live issues are considered, the article in this issue, entitled "Taxation and Prosperity," by Almond Shepard, is particularly apropos. The article exposes the defects of the present system

of taxation in Canada and the United States, and the inequalities of assessment, and suggests a remedy. Though short, the article is to the point, and will amply repay perusal.

In view of the present discussion of the grant of \$35,000,000 made by Canada, to be used in the construction of three Dreadnoughts, the following statement recently made in the German Reichstag by Admiral von Tirpitz, and that by Herr von Jagow, will be particularly interesting as setting forth the exact condition of affairs existing between Germany and Great Britain, since it was on account of the German peril that the money grant was made instead of the offer of ships to be built and maintained as a Canadian unit of the British navy.

GERMAN AND BRITISH NAVIES.

Details of the Reichstag Statement.

The Budget Committee of the Reichstag has produced official minutes of its proceedings at the time of the discussion. The main statement of Grand Admiral von Tirpitz, which attracted so much interest, is now described in the minutes as having been made "in reply to the reproach that his utterances betrayed a strong feeling (*eine starke Abneigung*) against England."

The Question of Competition.

The published text is as follows:—

"I must protest against the view that my utterances have a ring of feeling against England. I cannot understand how Herr Ledebour (a Socialist Deputy) has heard that in them. I am the first who would welcome gladly the arrival at an understanding with England. To make comparisons about proportionate strengths is very difficult. The numbers of ships do not alone afford any correct comparison. There are also the type of ship, the age of the ships, and other factors which can hardly be compared. Last year the English Minister of Marine, Mr. Churchill, made such a comparison. But in doing so he left gaps open. He stated that the English Dreadnoughts are at present to the German Dreadnoughts in a ratio of 1.6 to 1. In my opinion this ratio is for the battle fleet acceptable. It expresses the fact that we do not intend, and also have not intended, to enter

into competition with England. It gives us a measure of power such that it is difficult to attack us. This measure of power is maintained by means of the Navy Law. We do not need more. There can be no question of our desiring to proceed aggressively in regard to England, for aggressive procedure requires a considerable superiority. We have always insisted that we are not aiming at a navy as large as the English navy. The navy which we require is provided by the Navy Law. We had to choose between giving by means of a sufficiently strong navy, an adequate protection to our growing trade and to our industry, or standing always hat in hand. We chose the former course. The unsatisfied wishes ('zurückgestellte wünsche') of the naval authorities, of which I spoke last year in the Reichstag, refer not to an increase of the navy, but to a more rapid substitution of new cruisers for some old cruisers. Even the last navy bill has to do less with this moderate strengthening of the fleet than with the purpose of making our battle fleet more rapidly ready for war. This became necessary because of the modern development of types of ship, introduction of wireless telegraphy, concentration of ships in the North Sea, and other things. There does not exist an intention to proceed beyond the present framework of the Navy Law. I hope that by these words I have allayed any uneasiness which has arisen."

The following sentences are given without any context as "Further" declarations by Grand Admiral von Tirpitz:—

"Nothing is known here of a readiness on the part of England to enter into naval negotiations. It is absolutely inaccurate to say that we have ever rejected such a proposal. If we arrive at a serviceable agreement, the Navy Law has done its work. But in case of a formal agreement guarantees for carrying it out are necessary. There lies the difficulty. If, moreover, two parties desire to conclude a difficult bargain, which is to satisfy them both, one of them must not run to meet the other with open arms. Such intricate matters must be handled with foresight and skill, between man of business and man of business."

The Foreign Secretary's Speech.

It will be remembered that the committee still expressed a desire for a statement from either the Imperial Chancellor or the Foreign Secretary, and that on the following day

Herr von Jagow was present. The published text of his statement is as follows:—

“One of the last statements—the very last, if I am not mistaken—which my predecessor delivered in the Reichstag referred to our relations with England. Herr von Kiderlen then pointed out that during the whole of the recent crisis our relations with England had been relations of peculiar confidence. He referred to the good service rendered to the cause of an understanding among all the Powers by the frank conversations conducted in complete confidence between London and us during all phases of this crisis. He expressed the expectation that the conversations would continue to render this service. It gives me particular satisfaction to be able to state, on the first occasion offered to me for speaking in this place, that this expectation has been completely fulfilled. The intimate exchange of opinion which goes on between us and the English Government has contributed very considerably to the removal of difficulties of many kinds which had arisen during the last few months. We have now seen that we not only have with England point of contact of a sentimental kind, but that common interests exist as well. I am no prophet, but I indulge in the hope that, on the ground of common interests, which in politics is the most fruitful ground, we can continue to work with England and perhaps reap the harvest. But I should like to point out to you, gentlemen, that we are dealing with tender plants, which we must not by premature treatment or words prevent from coming to flower.”

The question of the Panama tolls still looms large on the political horizon of both Great Britain and the United States. Great Britain, through her Ambassador, Mr. Bryce, has demanded that the question be arbitrated. The British note embodying the demand is printed in this issue, as is also a speech in the Senate by the Honourable Elihu Root, upholding the contention of Great Britain, as against the position advocated by President Taft, which caused such a wide difference of opinion among American statesmen. A report to hand advises that President Wilson has intimated that he favours the Root amendment repealing the provision exempting American coast-wide ships from the payment of tolls.

PERSONAL.

Mr. George Browning Cramp, K.C., of the firm of Cramp, Ewing and McFadden, the oldest practising lawyer in the district of Montreal, recently passed away at his home, 62 McTavish street, after having been in indifferent health for some months. Mr. Cramp was one of the best known lawyers in Montreal, being particularly recognized as an expert on legal aspects of real estate transactions. He was regarded as an expert in the matter of titles, and aided in a consulting capacity for large corporations in the city.

The deceased was the son of the late Rev. J. M. Cramp, who at one time filled an important position on the staff of the Baptist College. He was born in England, but when still a young man came to Canada with his family, living for a time in Nova Scotia. He completed his education there, and was admitted to practice as a lawyer 58 years ago. For many years he was a partner of Mr. J. J. Day, K.C., and upon his retirement allied himself with the late Mr. A. F. Lunn, K.C., forming the firm of Lunn and Cramp. Mr. Lunn died in 1884, and four years later, Mr. Cramp formed a partnership with Mr. J. Armitage Ewing, K.C. Two years later Mr. George S. McFadden was admitted into the firm, and the business name of the firm has since been known as Cramp, Ewing and McFadden.

Mr. Cramp's advice was greatly sought after, and he acted in a consulting capacity for such corporations as McGill University, the Liverpool and London and Globe Insurance Company, the White Star-Dominion Line, and the Montreal Loan and Mortgage Company.

He was a member of the Mount Royal Club, St. James Club, and a prominent member of Olivet Baptist Church. Mr. Cramp, who was unmarried, is survived by one sister, Miss Cramp, of Montreal; his niece, Miss Nora Cramp, and three nephews, Mr. H. B. Muir and Mr. J. M. C. Muir, of this city, and Mr. Martin Cramp, of Ottawa.

In anticipation of the creation of four additional Supreme Court Judges for Alberta during the present session of the Legislature of the province, a number of candidates for the positions, which it is the privilege of the Dominion Government to fill, are already in the field.

At the present time there are five Supreme Court Judges in the province of Alberta. These are divided between Cal-

gary and Edmonton, and outside points are visited on the circuit system.

Growing amount of litigation consequent upon the development of the province has convinced the Alberta Government that an increase of the number of Judges is necessary, and it is expected that legislation creating these will be passed early in the present session.

The province created the positions, the Dominion fills and pays for them. The positions have not been created, but nevertheless a number of eager candidates have already commended themselves to the earnest consideration of the Dominion Government as desiring the honours.

Among these are J. F. Bowen, city solicitor, Edmonton; M. S. McCarthy, ex-M.P., Calgary; James Muir, Calgary; E. P. McNeill, Macleod, and W. C. Ives, of Lethbridge.

Owing to the rapid increase in shipping at the port of Prince Rupert, steps are being taken by the Bar association of the city to urge the appointment of a local registrar of the Admiralty Court for Prince Rupert. The Admiralty is a branch of the Exchequer Court, a Dominion Court with headquarters at Ottawa. The Dominion is divided into Admiralty districts, and a local Judge is appointed for each district.

At the present time the whole of British Columbia is in one district, over which Mr. Justice Martin presides. By reason of the appointment of Mr. Justice Martin to the Court of Appeals of the province, and owing to his duties as Judge in Admiralty in the southern end of the province, it is practically impossible that he hold Admiralty Court in Prince Rupert.

For that reason it is urged by the members of the Bar that a local Judge of the Admiralty Court for the northern end of the province, with headquarters at Prince Rupert, should be appointed, and the name of His Honour Judge Young, the resident County Court Judge, is suggested in that connection.

The creation of the Prince Rupert registry of this Court, and the appointment of a local Judge to preside in Admiralty, would mark a distinct step forward in the progress of the community, and it would be a matter of the very greatest convenience to all those connected with shipping.

Implementing the announcement in this connection recently made to the House by the Prime Minister, Mr. W. E. Burns, barrister, of Vancouver, has been appointed a

Commissioner under the Public Inquiries Act, to investigate all circumstances and conditions in respect to the production cost of coal in British Columbia, the transportation charges on this commodity to its various provincial markets, the suggestion that a combine in restraint of trade exists to the disadvantage of provincial consumers, and the suggestion that special attention to the export branch of the industry is in a large measure responsible for the present shortage and allegedly high cost of fuel to the British Columbia consumer, together with all other incidental and related matters touching the grievances of householders of this province.

Advisability of forming a Dominion Bar Association was discussed by the executive committee of the Ontario Bar Association at a meeting in the York Club. Legal luminaries in the various provinces will be communicated with as a preliminary to getting such a federation under way. One of the chief objects looked to is the making of uniform commercial laws throughout the Dominion. The committee reaffirmed the principle of the General Association, that there should be a Divorce Court in Canada, and formal representations to this effect will be made to Parliament. The committee also proceeded with the formation of a committee which is to endeavour to obtain a bankruptcy law for Canada, and Mr. James Bicknell, K.C., was made convener of the committee, which is to bring pressure on the Federal Government.

The Treasurer reported a substantial cash balance.

Sir Allan Aylesworth, K.C., M.G., was present, and made an address.

Seventeen were present, and they were the guests of President M. H. Ludwig, K.C., to dinner.

Mr. W. A. Boland, M.A., late of the firm of Patrick, Boland & Doherty, has severed his connection with that firm and has opened offices in rooms 4 and 5, Dunlop Block. Mr. Boland is one of the best known members of the legal profession in Yorkton, and for the past two years has been town solicitor.

Viscount Haldane, the Lord High Chancellor, will be the guest of the American Bar Association and will deliver the chief address at the annual meeting of the association, which is to be held at Montreal September 1st, next.

The Lord Chancellor, as soon as he received the invitation, which was tendered through Frank B. Kellogg, ex-

pressed his personal desire to accept, but as he is the holder of the great seal of state, he had to secure the consent of the King to leave the country during his term of office. This he has now received.

In formally accepting the invitation of the Bar Association Viscount Haldane wrote:—

“I esteem the invitation as an exceptional honour, and I look forward to the pleasure of meeting the great lawyers of the United States and Canada.”

Word has been just received in Toronto of the death at Aiken, South Carolina, of F. C. Cooke, a prominent Toronto barrister, and former partner in the law firm of Pinkerton & Cooke. For the past eight years, Mr. Cooke had been in poor health, and went to South Carolina two months ago in order to escape the severe weather in Toronto. He failed to receive much benefit by the change, however, and sank slowly until he passed peacefully away.

Mr. Cooke was 40 years old and unmarried. He lived with his family at 26 Leopold street. He was a member of the Albany Club and was popular in social and business circles in Toronto. His body will be brought to Toronto for burial.

Mr. C. A. Batson having formed a law partnership with Mr. J. L. Darling of Sault Ste. Marie, Ontario, in the Stewart block (opposite the post office), Main street, Thessalon, announces that he will now be in his office at Thessalon on Saturdays of each week.

Mr. Walter Clayton, barrister, has arrived in Penticton from Vancouver to be associated with Mr. W. H. T. Gahan in the practice of law.

L. J. Reyecraft, the well known Ridgetown barrister, has decided to leave Ridgetown about March 1st, to take a position with the C. P. R. at Winnipeg. Mr. Reyecraft was offered and has accepted the position of solicitor of the C. P. R. with headquarters at Winnipeg, his district extending from Fort William to Southern Saskatchewan.

Clare Montrose Wright, who at the time of the Kinrade tragedy in Hamilton was trying for the ministry, and who subsequently married Miss Florence Kinrade, has been called to the bar of Alberta. He was with Ryan and Robinson, Calgary, when he passed his final examinations.

The results of the recent Bar examinations at Halifax, N. S., have been announced, and the many friends of A. W.

Jones and J. S. Roper will be pleased to learn that they have completed all requirements necessary to admission to the Bar. Mr. Jones, who is with the firm of McInnis, Mellish, Fulton and Kenny, is widely known by the business public, not only of this city, but of the province, and his career will be watched with much interest. His marks in all five papers were highly creditable. Mr. Roper, of the firm of Harris, Henry, Rogers and Harris, also made a good shewing, and his future will be as well watched with interest.

Mr. Ira Standish, the well-known lawyer of the city, died at his residence, 20 Warren Road, after a short illness. Following two severe attacks of typhoid fever, which occurred about two years ago, Mr. Standish had been in poor health. Subsequently he was seized with another severe sickness, and although he recovered somewhat from its effects, he suffered a relapse, became worse, gradually sinking until the final summons came.

The late Mr. Standish was born in Trafalgar township, near Oakville, about 49 years ago. After completing his education he graduated in 1888, and entered the firm of Beatty, Hamilton and Cassels. Subsequently the firm divided, and he became connected with Cassels and Standish, having entered the new firm. About six years ago he formed a partnership with Mr. Fletcher Snider, under the title of Standish and Snider.

LAW ASSOCIATION REPORTS.

ANNUAL DINNER OF THE MOOSE JAW BAR.

The annual dinner of the Moose Jaw Bar Association was held recently in the Royal George grill room, and passed off with considerable éclat. J. Franklin Hare, the president, was in the chair. After justice had been done by the ladies and gentlemen present to the cuisine of the house. Toast-master Mr. Hare proposed the toast to the King, then calling upon H. B. Spotton to propose the toast to The Bench.

In the absence of Judge Ouseley, Magistrate Dunn was asked to respond. In his reply Dunn commented favourably on the system which obtains in the Canadian judiciary, namely, the life appointment of Judges, and speaking to the

young members of the bar and students he said that it should be the ambition of every lawyer to aspire to the bench, even if by so doing he sacrificed the more substantial emoluments of legal practice. It was only by such sacrifice of the leaders in the profession that strong benches could be obtained.

The speeches of both Messrs. Dunn and Spotton were interspersed with smart legal quips and much interest was evinced when the wit of the local judiciary, H. C. Pope, whose name was coupled with a pawky Scot, C. Lennox, was called upon to respond to the toast to "The Profession." In reply, Mr. Lennox, who had just arrived back from an extended trip from the old country, maintained that according to the history of the bar in its earliest times, it was the *vox populi*. While doctors, he said, and ministers, attended to physical and spiritual needs, members of the bar tried to enable every man to live at peace with his neighbour. In concluding he reminded the gathering of an old adage of an Edinburgh jurist, which was, "Never explain to your client, never regret, and never apologize," three things which a member of the noble calling should never be obliged to do.

In response H. C. Pope started off with a light sally in his characteristic humour. It was easier to propose than to reply he said, mindful of the ladies present, but, added, that seemingly to many of the bachelors present, proposing even was difficult. Unlike doctors, he continued, the bar members could not bury their mistakes, these were ever with them. The speaker then referred with pride to the *esprit de corps* that existed between members of the local judiciary. Against each other they fought valiantly, but dined as friends. Referring then to a simile of W. F. Dunn's, who had likened the bar members and the bench to hod carriers and bricklayers, Mr. Pope proposed the toast to the hod carriers.

Even more renowned in legal pleasantries and wit was J. E. Chisholm, who was called for the fifth consecutive year to propose the toast to the ladies. Personally, while commending the work of the banquet committee, he thought it quite in order that the committee should "shew cause" why he should have the honour thrust upon him. "I suppose," he said, "I am one of those who have left undone the things which they ought to have done." "And have done the things which they ought not to have done," responded a voice in sepulchral tones, at which there was great laughter.

H. D. Pickett then proposed the toast to "The Students," which was responded to by W. G. Ross. With the customary

farewell song the gathering then broke up. Throughout the evening the Royal George orchestra discoursed fine selections of the latest music. Theodore Fossum accompanied on the piano to the vocal efforts of Arthur Terrill, which were very well received.

ANNUAL MEETING OF THE NOVA SCOTIA BAR.

The annual meeting of the Nova Scotia Barristers' Society was held in the west Court room, John T. Ross, K.C., senior councillor, in the chair, in the absence through illness of the President, H. Mellish, K.C. The reports of the treasurer, secretary, librarian, were read, and shewed the affairs of the society to be in a flourishing condition, and were passed unanimously. A resolution was passed authorizing the incoming council to procure legislation on the basis of the Barristers' Act of 1893, requiring each barrister to take out an annual certificate before he could tax or recover costs. The following resolution was moved by J. J. Power, K.C., and seconded by J. A. Chisholm, K.C., and was subsequently ordered to lay on the table for a month and be considered at an adjourned meeting on March 25th next, at 4 p.m., then to be dealt with, and that in the meantime copies of it be sent to each certificated barrister in the province, inviting his opinion and notifying that it would be dealt with at the adjourned meeting. The resolution reads thus:—

Whereas since the incorporation of this society in the early 50's no improvement has been made in choosing an executive representative of the bar of the province.

Be it, therefore, resolved, that the council of the Nova Scotia Bar Society be requested by this society in annual meeting assembled to procure such legislation at the present session of the local Legislature, amending the Barristers' Act on the lines of the Ontario, Manitoba and British Columbia Benchers' Statute, so that the president, vice-president, secretary, treasurer and members of the council residing in the city of Halifax, and one member of the council from each county, shall be elected by the Provincial Bar by a voting paper sent out in proper form, and under proper supervision, prior to the annual meeting in each year, to each certificated barrister, who may vote for an executive as above of his own choice, and return the said ballot after marking the same to the proper officer at Halifax appointed

to receive the same; and that the said ballots shall then be counted by the proper officer, and the result communicated to the annual meeting and the candidates having the majority votes shall constitute the society's executive for the ensuing year.

The mover, in speaking to the resolution, referred to the lack of interest taken in the society's meetings generally and the unrepresentative character as far as the whole province was concerned of the executive officers elected at the annual meetings at which only a handful attend and instanced the present gathering yesterday as being only attended by 19 members of the Bar and those all belong to Halifax. The seconder, Mayor Bligh, J. C. O'Mullin and T. S. Rogers, K.C., favoured the principle of the resolution, and thought it time for a change, and on motion of Mr. Rogers, K.C., seconded by Mr. Burchell, K.C., it was ordered to lay on the table for a month and the opinion of the profession taken on it by circulating copies of it as above.

R. H. Murray gave notice of a motion he would move at the adjourned meeting, for holding quarterly meetings of the society at which law topics would be discussed and law papers read by prominent members of the profession and social intercourse of the members of the Bar otherwise promoted. The suggestion met with very general approval.

The following officers were then elected for the ensuing year:—

President, H. Mellish, K.C.; Vice-President, John T. Ross, K.C.; Secretary, W. R. Foster; Treasurer, J. L. McKinnon; Council, T. S. Rogers, K.C., J. A. Chisholm, K.C., S. Jenks, K.C., F. P. Bligh, E. P. Allison, and J. A. McDonald. W. H. Covert, K.C., was elected Court House Commissioner, and the county members of the council re-elected with the exception that J. A. McDonald, K.C., succeeded the late A. J. McDonald in Victoria and F. L. Milner succeeds J. L. Ralston, for Cumberland. The meeting then adjourned to March 25th next.

ANNUAL MEETING OF THE BARRISTERS' SOCIETY OF NEW BRUNSWICK.

The New Brunswick Barristers' Society at their annual meeting, failed to reach a decision on the often discussed question of the placing of other law schools on the same basis with King's College Law School and allowing their graduates to

be admitted as attorneys without standing the society's usual examinations.

The matter was discussed at considerable length by the members of the profession who gathered for the meeting, the suggestion being made that graduates of Dalhousie, Harvard and Yale Law Schools be put on the same standing with those from King's College. Finally the matter was left to a committee, consisting of the Registrar, Dr. T. C. Allen, J. D. Phinney, K.C., and H. A. Powell, K.C., to take up the whole question of the standing generally of the schools of law with the society.

JUDICATURE ACT AMENDMENTS.

Dr. Allen, as treasurer of the society, presented his annual report, shewing the society to be in a most encouraging condition, the balance on hand at the end of the year being \$992.02.

The question of amendments to the Judicature Act was discussed at length, and it was finally decided to leave the matter for further deliberation in the hands of the committee appointed at the last meeting, consisting of the retiring President, R. W. Hewson, K.C., the registrar, and Mr. J. B. M. Baxter, K.C.

STENOGRAPHERS AT COUNTY COURTS.

Regarding the question of having stenographers in attendance at the County Courts, Ald. P. A. Guthrie, of this city, said that with Judges Wells, Carleton, and Forbes, he had met Hon. J. D. Hazen, when he was Premier and Attorney-General, at St. John, and Hon. Mr. Hazen had told the delegation that he was not sure that the proposal would meet with the favour of the municipalities, but promised to take the matter up. Then Hon. Mr. Hazen became a member of the Federal Cabinet and thus was unable to do anything further. The committee was continued, Mr. T. J. Carter, K.C., M.L.A., declaring that the system was in vogue in Victoria county and was proving a money saver.

OFFICERS ELECTED.

The election of officers resulted as follows:—

President, J. B. M. Baxter, K.C., M.L.A.; Vice-President, A. R. Slipp, K.C., M.L.A.; Secretary-Treasurer, Dr. T. C. Allen; Members of Council, M. G. Teed, K.C.; A. J. Gregory, K.C.; H. A. Powell, K.C.; J. D. Phinney, K.C.;

R. A. Lawlor, K.C.; A. B. Connell, K.C.; W. A. Ewing, K.C. There are four additional members ex-officio.

Among those present at the meeting were: R. W. Hewson, K.C., of Moncton, the retiring president; Attorney-General Grimmer, Dr. T. C. Allen, A. B. Connell, K.C., of Woodstock; R. A. Lawlor, K.C., of Chatham; T. J. Carter, K.C., of Andover; J. D. Phinney, K.C., J. T. Sharkey, A. R. Slipp, K.C., R. B. Hanson, E. A. McKay, H. G. Fenety, Peter J. Hughes, E. C. Weyman, of St. John; H. A. Powell K.C., C. D. Richards, A. T. LeBlanc, of Campbellton; J. R. H. Simms, of Woodstock; F. R. Taylor, of St. John; W. P. Jones, K.C., of Woodstock; L. P. D. Tilley, of St. John; P. A. Guthrie, J. J. F. Winslow, and others.

REPORT OF AMERICAN BAR ASSOCIATION.

The report of the 35th annual meeting of the American Bar Association, held at Milwaukee, Wis., just to hand, and speaks eloquently of the energy and ability of those having in charge the meeting and publication of the proceedings. The association is an exceedingly strong one, totalling 5,584 members, drawn from every State in the Union.

After the preliminary work was completed, an able address was given by the President, S. S. Gregory, Esq., of Chicago, Ill., and addresses were made on "The New Nationalism," by Frank B. Kellogg, of the Minnesota Bar; "The Courts and Constitution," by Senator George Sutherland, of Utah; "The American Judicial System of Judges," by Henry D. Esterbrook, of New York; "Lawyers," by Joseph C. France, of Baltimore, Md., and "Procedure," by Fred. N. Judson, of St. Louis, Mo.

The tone of all these addresses is an exceedingly high one, and the ethical ideals exemplified in the addresses reflect the high standard set by these leaders of the Bar in the United States, which must have done much to inspire all who had the privilege of listening to the addresses with a higher opinion and a better realization of the nobility of their calling than ever before, in addition to which reports were made by various committees on the great questions of interest of the day.

A perusal of this report would undoubtedly be to the advantage of every member of the legal profession from one end of Canada to the other.

ANNUAL MEETING YORK LAW ASSOCIATION.

At the last Annual Meeting of the County of York Law Association, a resolution was passed that members of this Association wait on the Government to request the Government to introduce the "Torrens System" of Land Registration of Titles. This was referred to a Committee composed of Mr. Beverley Jones, Mr. George C. Campbell, Mr. George M. Kelley and Mr. Harold W. A. Foster, for inquiry and report.

By a unanimous vote, the hearty thanks of the meeting were tendered to Mr. Angus MacMurchy, K.C., convener of the committee, with respect to the new registry office, for valuable services rendered during the past year.

The following are the officers of the association for the year 1913: President—John T. Small, K.C.; Vice-president—M. H. Ludwig, K.C.; Treasurer—John H. Moss, K.C.; Secretary—Harold W. A. Foster; Curator—J. D. Falconbridge; Historian—Beverley Jones; Trustees—D. T. Symons, K.C., G. M. Kelley, Chas. Elliott, J. C. Campbell, Shirley Denison, K.C., H. W. Mickle, G. L. Smith, C. B. Nasmith, and E. J. Hearn; Auditors—T. H. Barton and R. D. Hume.

COMMUNICATIONS.

Sarnia, Ont., March 4th, 1913.

SIR,—At a recent meeting of the Lambton Law Association it was moved, seconded and unanimously resolved:—

"That the secretary be instructed to write to the secretary of the Law Society of Upper Canada, calling attention to the fact that the index to volume 3 of the *Weekly Notes*, which ended in September last, was not issued to the legal profession until late in February of the present year, and to urge upon them the desirability of having the index issued promptly on the completion of each volume. The volumes are so large, and the cases in each one so numerous, that the labour of finding cases without an index, and the consequent

waste of time, are too great to be endured longer than is absolutely necessary. We would respectfully urge on those who are responsible for the delay the great inconvenience and loss of time thereby occasioned, and the necessity of completing arrangements to ensure promptness in the future. The secretary is also instructed to forward a copy of this resolution to the secretary of each of the county Law Associations with a view to concerted action."

Yours truly,

ALEX. SAUNDERS,

Secretary County of Lambton Law Association.

Sarnia, Ont., March 1st, 1913.

SIR,—At a meeting of the Bar Association of the county of Lambton, held at the County Buildings, Sarnia, on February 28th, 1913, the following resolution was moved and seconded, and after discussion in which member after member emphatically condemned the dilatory course that had been pursued, was unanimously adopted:—

"That in the opinion of the members of the bar of the county of Lambton, the delay in the revision of the statutes of the province is most unreasonable; that the inconvenience and loss of time to the profession by reason of the delay and the attempt at piece-meal revision is enormous; that the waste of time, inconvenience, and uncertainty inflicted on public officials of all kinds whose duties are regulated by statute, are so great as to be a crying evil; and that we respectfully urge on those entrusted with the responsibility for the work of revision, the urgent necessity for the prompt and speedy completion of the revision and the issue of the revised statutes, which are now about six years overdue; that a copy of this resolution be forwarded to the Honourable the Attorney-General of the province, and also to each of the legal periodicals; that a copy be forwarded to the secretary of the Law Society of Upper Canada, and to the secretary of each of the County Law Associations, with a request for concerted effort on the part of the profession directed towards the removal of the grievance complained of."

Yours truly,

A. WEIR,

President Lambton Law Association.

PANAMA CANAL TOLLS.

BRITAIN RENEWS ARBITRATION DEMAND.

Great Britain's final word to the Taft administration on the Panama Canal tolls dispute just made public, insisted that a case for settlement under the Hay-Pauncefote treaty had arisen, but suggested in effect that there would not be time to discuss the subject further before the United States Government changed hands.

Secretary of State Knox acknowledged receipt of this communication without committing the state department to an answer, reserving to his successor the decision of the question of whether it is proper to make such answer at all, or to await another communication from the British Government continuing the argument.

This latest British note, which was submitted to Secretary Knox yesterday, instead of being a communication from Sir Edward Grey, the foreign minister, was a set of "observations" by Ambassador Bryce. The ambassador explained his reasons for submitting at this stage an objection to the contention in the last American note that Sir Edward Grey was urging a hypothetical case and that there was no reason for his protest in advance of the actual collection of tolls from British ships, while American ships were allowed to pass free.

Bryce's Note.

The note follows:—

"His Majesty's Government are unable before the administration leaves office to reply fully to the arguments contained in your despatch of the seventeenth ultimo to the United States charge d'affaires at London regarding the difference of opinion that has arisen between our two governments as to the interpretation of the Hay-Pauncefote treaty, but they desire me in the meantime to offer the following observations with regard to the argument that no case has yet arisen calling for any submission to arbitration of the points in difference between His Majesty's Government and that of the United States on the interpretation of the Hay-Pauncefote treaty, because no actual injury has as yet resulted to any British interest and all that has been done so far has been to pass an Act of Congress under

which action held by His Majesty's Government to be prejudicial to British interest might be taken.

Dissents from Knox's View.

"From this view His Majesty's Government feel bound to express their dissent. They conceive that international law or usage does not support the doctrine that the passing of a statute in contravention of a treaty right affords no ground of complaint for the infraction of that right, and that the nation which holds that its treaty rights have been so brought into question by a denial that they exist, must before protesting and seeking a means of determining the point at issue, wait until some further action violating those rights in a concrete instance has been taken, which in the present instance would, according to your argument, seem to mean until tolls have been actually levied upon British vessels from which vessels owned by citizens of the United States have been exempted.

Inconsistent with Treaty.

"The terms of the proclamation issued by the President fixing the canal tolls, and the particular method which your note sets forth as having been adopted by him, in his discretion, on a given occasion for determining on what basis they should be fixed, do not appear to His Majesty's Government to affect the general issue as to the meaning of the Hay-Pauncefote treaty which they have raised. In their view the Act of Congress, when it declared that no tolls should be levied on ships engaged in the coasting trade of the United States, and when, in further directing the President to fix those tolls within certain limits, it distinguished between vessels of the citizens of the United States and other vessels, was in itself and apart from any action which may be taken under it, inconsistent with the provisions of the Hay-Pauncefote treaty for equality of treatment between the vessels of all nations. The exemption referred to appears to His Majesty's Government to conflict with the express words of rule one of article three of the Hay-Pauncefote treaty, and the Act gave the President no power to modify or discontinue the exemption.

Equality of Treatment Denied.

"In their opinion the mere conferring by Congress of power to fix lower tolls on U. S. ships than on British ships

amounts to a denial of the right of British shipping to equality of treatment, and is, therefore, inconsistent with the treaty irrespective of the particular way in which such power has been so far actually exercised.

"In stating thus briefly their view of the compatibility of the action of Congress with their treaty rights, his Majesty's Government hold that the difference which exists between the two governments is clearly one which falls within the meaning of article 1 of the Arbitration Treaty of 1908.

"As regards the suggestion contained in the last paragraph but one of your note under reply, His Majesty's Government conceive that article 1 of the treaty of 1908 so clearly meets the case that has now arisen, that it is sufficient to put its provisions in force in whatever manner the two governments may find the most convenient. It is unnecessary to repeat that a reference to arbitration would be rendered superfluous if steps were taken by the United States to remove the objection entertained by His Majesty's Government to the Act.

Case for Arbitration.

"His Majesty's Government have not desired me to argue in this note that their interpretation of the Hay-Pauncefote treaty is the correct view, but only that a case for the arbitration of that issue has already arisen and now exists. They conceive that the interest of both countries requires that issue to be settled promptly before the opening of the canal, and by means which will leave no ground for regret or complaint. The avoidance of possible friction has been one of the main objects of those methods of arbitration of which the United States has been for so long a foremost and consistent advocate. His Majesty's Government think it more in accordance with the general arbitration treaty that the settlement desired should precede, rather than follow, the doing of any acts which could raise questions of actual damage suffered; and better, also, that when vessels begin to pass through the great waterway, in whose construction all the world has been interested, there should be left subsisting no cause of difference which could prevent any other nation from joining without reserve in the satisfaction the people of the United States will feel at the completion of a work of such grandeur and utility."

SPEECH OF HON. ELIHU ROOT.

Mr. President, in the late days of last summer, after nearly nine months of continuous session, Congress enacted, in the bill to provide for the administration of the Panama Canal, a provision making a discrimination between the tolls to be charged upon foreign vessels and the tolls to be charged upon American vessels engaged in coastwise trade. We all must realize, as we look back, that when that provision was adopted the members of both Houses were much exhausted; our minds were not working with their full vigor; we were weary physically and mentally. Such discussion as there was was to empty seats. In neither House of Congress, during the period that this provision was under discussion, could there be found more than a scant dozen or two of members. The provision has been the cause of great regret to a multitude of our fellow citizens, whose good opinion we all desire and whose leadership of opinion in the country makes their approval of the course of our Congress an important element in maintaining that confidence in government which is so essential to its success. The provision has caused a painful impression throughout the world that the United States has departed from its often-announced rule of equality of opportunity in the use of the Panama Canal, and is seeking a special advantage for itself in what is believed to be a violation of the obligations of a treaty. Mr. President, that opinion of the civilized world is something which we may not lightly disregard. "A decent respect to the opinions of mankind" was one of the motives stated for the people of these colonies in the great Declaration of American Independence.

The effect of the provision has thus been doubly unfortunate, and I ask the Senate to listen to me while I endeavour to state the situation in which we find ourselves; to state the case which is made against the action that we have taken, in order that I may present to the Senate the question whether we should not either submit to an impartial tribunal the question whether we are right; so that if we are right, we may be vindicated in the eyes of all the

world, or whether we should not, by a repeal of the provision, retire from the position which we have taken.

In the year 1850, Mr. President, there were two great powers in possession of the North American continent to the north of the Rio Grande. The United States had but just come to its full stature. By the Webster-Ashburton Treaty of 1842 our north-eastern boundary had been settled, leaving to Great Britain that tremendous stretch of seacoast including Nova Scotia, New Brunswick, Newfoundland, Labrador, and the shores of the Gulf of St. Lawrence, now forming the Province of Quebec. In 1846 the Oregon boundary had been settled, assuring to the United States a title to that vast region which now constitutes the States of Washington, Oregon, and Idaho. In 1848 the Treaty of Guadalupe-Hidalgo had given to us that great empire wrested from Mexico as a result of the Mexican War, which now spreads along the coast of the Pacific as the State of California, and the great region between California and Texas.

Inspired by the manifest requirements of this new empire, the United States turned its attention to the possibility of realizing the dream of centuries and connecting its two coasts—its old coast upon the Atlantic and its new coast upon the Pacific—by a ship canal through the Isthmus; but when it turned its attention in that direction it found the other empire holding the place of advantage. Great Britain had also her coast upon the Atlantic and her coast upon the Pacific, to be joined by a canal. Further than that, Great Britain was a Caribbean power. She had Bermuda and the Bahamas; she had Jamaica and Trinidad; she had the Windward Islands and the Leeward Islands; she had British Guiana and British Honduras; she had, moreover, a protectorate over the Mosquito coast, a great stretch of territory upon the eastern shore of Central America which included the river San Juan and the valley and harbour of San Juan de Nicaragua, or Greytown. All men's minds then were concentrated upon the Nicaragua Canal route, as they were until after the treaty of 1901 was made.

And thus when the United States turned its attention toward joining these two coasts by a canal through the Isthmus it found Great Britain in possession of the eastern end of the route which men generally believed would be

the most available route for the canal. Accordingly, the United States sought a treaty with Great Britain by which Great Britain should renounce the advantage which she had and admit the United States to equal participation with her in the control and the protection of a canal across the Isthmus. From that came the Clayton-Bulwer Treaty.

By that treaty Great Britain agreed with the United States that neither Government should "ever obtain or maintain for itself any exclusive control over the ship canal"; that neither would "make use of any protection" which either afforded to a canal "or any alliance which either" might have "with any State or people for the purpose of erecting or maintaining any fortifications, or of occupying, fortifying, or colonizing Nicaragua, Costa Rica, the Mosquito coast, or any part of Central America, or of assuming or exercising dominion over the same," and that neither would "take advantage of any intimacy, or use any alliance, connection, or influence that either" might "possess with any State or Government through whose territory the said canal may pass, for the purpose of acquiring or holding, directly or indirectly, for the citizens or subjects of the one, any rights or advantages in regard to commerce or navigation through the said canal which shall not be offered on the same terms to the citizens or subjects of the other."

You will observe, Mr. President, that under these provisions the United States gave up nothing that it then had. Its obligations were entirely looking to the future; and Great Britain gave up its rights under the protectorate over the Mosquito coast, gave up its rights to what was supposed to be the eastern terminus of the canal. And, let me say without recurring to it again, under this treaty, after much discussion which ensued as to the meaning of its terms, Great Britain did surrender her rights to the Mosquito coast, so that the position of the United States and Great Britain became a position of absolute equality. Under this treaty also both parties agreed that each should "enter into treaty stipulations with such of the Central American States as they" might "deem advisable for the purpose"—I now quote the words of the treaty—"for the purpose of more effectually carrying out the great design of this convention, namely, that of constructing and maintaining the said canal as a ship communication between the

two oceans for the benefit of mankind, on equal terms to all, and of protecting the same."

That declaration, Mr. President, is the cornerstone of the rights of the United States upon the Isthmus of Panama, rights having their origin in a solemn declaration that there should be constructed and maintained a ship canal "between the two oceans for the benefit of mankind, on equal terms to all."

In the eighth article of that treaty the parties agreed:

The Governments of the United States and Great Britain having not only desired, in entering into this convention, to accomplish a particular object, but also to establish a general principle, they hereby agree to extend their protection, by treaty stipulations, to any other practicable communications, whether by canal or railway, across the Isthmus which connects North and South America, and especially to the interoceanic communications, should the same prove to be practicable, whether by canal or railway, which are now proposed to be established by the way of Tehuantepec, or Panama. In granting, however, their joint protection to any such canals or railways as are by this article specified, it is always understood by the United States and Great Britain that the parties constructing or owning the same shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable; and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

There is the explicit agreement for equality of treatment to the citizens of the United States and to the citizens of Great Britain in any canal, wherever it may be constructed, across the Isthmus.

Some years after the treaty, Canada undertook to do something quite similar to what we have undertaken to do in this law about the Panama Canal. It provided that while nominally a toll of 20 cents a ton should be charged upon the merchandise both of Canada and of the United States there should be a rebate of 18 cents for all merchandise which went to Montreal or beyond, leaving a toll

of but 2 cents a ton for that merchandise. The United States objected; and I beg your indulgence while I read from the message of President Cleveland upon that subject, sent to the Congress August 23, 1888. He says:—

By Article 27 of the treaty of 1871, provision was made to secure to the citizens of the United States the use of the Welland, St. Lawrence, and other canals in the Dominion of Canada on terms of equality with the inhabitants of the Dominion, and to also secure to the subjects of Great Britain the use of the St. Clair Flats Canal on terms of equality with the inhabitants of the United States.

The equality with the inhabitants of the Dominion which we were promised in the use of the canals of Canada did not secure to us freedom from tolls in their navigation, but we had a right to expect that we, being Americans and interested in American commerce, would be no more burdened in regard to the same than Canadians engaged in their own trade; and the whole spirit of the concession made was, or should have been, that merchandise and property transported to an American market through these canals should not be enhanced in its cost by tolls many times higher than such as were carried to an adjoining Canadian market. All our citizens, producers and consumers, as well as vessel owners, were to enjoy the equality promised.

And yet evidence has for some time been before the Congress, furnished by the Secretary of the Treasury, shewing that while the tolls charged in the first instance are the same to all, such vessels and cargoes as are destined to certain Canadian ports—their coastwise trade—are allowed a refund of nearly the entire tolls, while those bound for American ports are not allowed any such advantage.

To promise equality and then in practice make it conditional upon our vessels doing Canadian business instead of their own, is to fulfil a promise with the shadow of performance.

Upon the representations of the United States embodying that view, Canada retired from the position which she had taken, rescinded the provision for differential tolls, and put American trade going to American markets on the same basis of tolls as Canadian trade going to Canadian markets. She did not base her action upon any idea that there was no competition between trade to American

ports and trade to Canadian ports, but she recognized the law of equality in good faith and honour; and to this day that law is being accorded to us and by each great nation to the other.

I have said, Mr. President, that the Clayton-Bulwer Treaty was sought by us. In seeking it we declared to Great Britain what it was that we sought.

After the lapse of some 30 years, during the early part of which we were strenuously insisting upon the observance by Great Britain of her obligations under the Clayton-Bulwer Treaty, and during the latter part of which we were beginning to be restive under our obligations by reason of that treaty, we undertook to secure a modification of it from Great Britain. In the course of that undertaking there was much discussion and some difference of opinion as to the continued obligations of the treaty. But I think that was finally put at rest by the decision of Secretary Olney in the memorandum upon the subject made by him in the year 1896. In that memorandum he said:

Under these circumstances, upon every principle which governs the relation to each other, either of nations or of individuals, the United States is completely estopped from denying that the treaty is in full force and vigor.

If changed conditions now make stipulations, which were once deemed advantageous, either inapplicable or injurious, the true remedy is not in ingenious attempts to deny the existence of the treaty or to explain away its provisions, but in a direct and straightforward application to Great Britain for a reconsideration of the whole matter.

We did apply to Great Britain for a reconsideration of the whole matter, and the result of the application was the Hay-Pauncefote Treaty. That treaty came before the Senate in two forms: First, in the form of an instrument signed on the 5th of February, 1900, which was amended by the Senate; and, second, in the form of an instrument signed on the 18th of November, 1901, which continued the greater part of the provisions of the earlier instrument, but somewhat modified or varied the amendments which had been made by the Senate to that earlier instrument.

It is really but one process by which the paper sent to the Senate in February, 1900, passed through a course of amendment; first, at the hands of the Senate, and then at

the hands of the negotiators between Great Britain and the United States, with the subsequent approval of the Senate. In both the first form and the last of this treaty the preamble provides for preserving the provisions of Article 8 of the Clayton-Bulwer Treaty. Both forms provide for the construction of the canal under the auspices of the United States alone instead of its construction under the auspices of both countries.

Both forms of that treaty provide that the canal might be—constructed under the auspices of the Government of the United States, either directly at its own cost or by gift or loan of money to individuals or corporations or through subscription to or purchase of stock or shares—that being substituted for the provisions of the Clayton-Bulwer Treaty under which both countries were to be patrons of the enterprise.

Under both forms it was further provided that—

Subject to the provisions of the present convention, the said Government—the United States—shall have and enjoy all the rights incident to such construction, as well as the exclusive right of providing for the regulation and management of the canal.

That provision, however, for the exclusive patronage of the United States was subject to the initial provision that the modification or change from the Clayton-Bulwer Treaty was to be for the construction of such canal under the auspices of the Government of the United States, without impairing the general principle of neutralization established in Article 8 of that convention.

Then the treaty as it was finally agreed to provides that the United States “adopt; as the basis of such neutralization of such ship canal,” the following rules, substantially as embodied in the convention “of Constantinople, signed the 29th of October, 1888,” for the free navigation of the Suez Maritime Canal; that is to say:

First. The canal shall be free and open . . . to the vessels of commerce and of war of all nations “observing these rules on terms of entire equality, so that there shall be no discrimination against any nation or its citizens or subjects in respect to the conditions or charges of traffic, or otherwise.” Such conditions and charges of traffic shall be just and equitable.

Then follow rules relating to blockade and vessels of war, the embarkation and disembarkation of troops, and the extension of the provisions to the waters adjacent to the canal.

Now, Mr. President, that rule must, of course, be read in connection with the provision for the preservation of the principle of neutralization established in Article 8 of the Clayton-Bulwer convention.

Let me take your minds back again to Article 8 of the Clayton-Bulwer convention, consistently with which we are bound to construe the rule established by the Hay-Pauncefote convention. The principle of neutralization provided for by the eighth article is neutralization upon terms of absolute equality both between the United States and Great Britain and between the United States and all other powers.

It is always understood—says the eighth article—by the United States and Great Britain that the parties constructing or owning the same—that is, the canal—shall impose no other charges or conditions of traffic thereupon than the aforesaid Governments shall approve of as just and equitable, and that the same canals or railways, being open to the citizens and subjects of the United States and Great Britain on equal terms, shall also be open on like terms to the citizens and subjects of every other State which is willing to grant thereto such protection as the United States and Great Britain engage to afford.

Now, we are not at liberty to put any construction upon the Hay-Pauncefote Treaty which violates that controlling declaration of absolute equality between the citizens and subjects of Great Britain and the United States.

When the Hay-Pauncefote convention was ratified by the Senate it was in full view of this controlling principle, in accordance with which their act must be construed, for Senator Davis, in his report from the Committee on Foreign Relations, to which I have already referred—the report on the treaty in its first form, states, after referring to the Suez convention of 1888:

The United States can not take an attitude of opposition to the principles of the great Act of October 22, 1888, without discrediting the official declarations of our Government for 50 years on the neutrality of an Isthmian canal and its equal use by all nations without discrimination.

To set up the selfish motive of gain by establishing a monopoly of a highway that must derive its income from the patronage of all maritime countries would be unworthy of the United States if we owned the country through which the canal is to be built.

That our Government or our people will furnish the money to build the canal presents the single question whether it is profitable to do so. If the canal, as property, is worth more than its cost, we are not called on to divide the profits with other nations. It is worth less and we are compelled by national necessities to build the canal, we have no right to call on other nations to make up the loss to us. In any view, it is a venture that we will enter upon if it is to our interest, and if it is otherwise we will withdraw from its further consideration.

The Suez Canal makes no discrimination in its tolls in favour of its stockholders, and, taking its profits or the half of them as our basis of calculation, we will never find it necessary to differentiate our rates of toll in favor of our own people in order to secure a very great profit on the investment.

In view of that declaration of principle, in the face of that declaration, the United States cannot afford to take a position at variance with the rule of universal equality established in the Suez Canal convention—equality as to every stockholder and all non-stockholders, equality as to every nation whether in possession or out of possession. In the face of that declaration the United States cannot afford to take any other position than upon the rule of universal equality of the Suez Canal convention.

Now, let me read the declaration made to Great Britain to induce her to modify the Clayton-Bulwer Treaty and give up her right to joint control of the canal and put in our hands the sole power to construct it or patronize it or control it.

Mr. Blaine said in his instructions to Mr. Lowell on June 24, 1881, directing Mr. Lowell to propose to Great Britain the modification of the Clayton-Bulwer Treaty.

I read his words:

The United States recognizes a proper guarantee of neutrality as essential to the construction and successful operation of any highway across the Isthmus of Panama, and in the last generation every step was taken by this Gov-

ernment that is deemed requisite in the premises. The necessity was foreseen and abundantly provided for long in advance of any possible call for the actual exercise of power. . . . Nor, in time of peace, does the United States seek to have any exclusive privileges accorded to American ships in respect to precedence or tolls through an interoceanic canal any more than it has sought like privileges for American goods in transit over the Panama Railway, under the exclusive control of an American corporation. The extent of the privileges of American citizens and ships is measurable under the treaty of 1846 by those of Colombian citizens and ships. It would be our earnest desire and expectation to see the world's peaceful commerce enjoy the same just, liberal, and rational treatment.

Again, he said to Great Britain:

The United States, as I have before had occasion to assure your Lordship, demand no exclusive privileges in these passages, but will always exert their influence to secure their free and unrestricted benefits, both in peace and war, to the commerce of the world.

It was upon that declaration, upon that self-denying declaration, upon that solemn assurance, that the United States sought not and would not have any preference for its own citizens over the subjects and citizens of other countries that Great Britain abandoned her rights under the Clayton-Bulwer Treaty and entered into the Hay-Pauncefote Treaty, with the clause continuing the principles of clause 8, which embodied these same declarations, and the clause establishing the rule of equality taken from the Suez Canal convention. We are not at liberty to give any other construction to the Hay-Pauncefote Treaty than the construction which is consistent with that declaration.

By public declarations, by the solemn asseverations of our treaties with Colombia in 1846, with Great Britain in 1850, our treaties with Nicaragua, our treaty with Great Britain in 1901, our treaty with Panama in 1903, we have presented to the world the most unequivocal guaranty of disinterested action for the common benefit of mankind and not for our selfish advantage.

In the message which was sent to Congress by President Roosevelt on the 4th of January, 1904, explaining the course of this Government regarding the revolution in Panama and the making of the treaty by which we acquired all

the title that we have upon the Isthmus, President Roosevelt said:

If ever a Government could be said to have received a mandate from civilization to effect an object the accomplishment of which was demanded in the interest of mankind, the United States hold that position with regard to the interoceanic canal.

There has been much discussion for many years among authorities upon international law as to whether artificial canals for the convenience of commerce did not partake of the character of natural passageways to such a degree that, by the rules of international law, equality must be observed in the treatment of mankind by the nation which has possession and control. Many very high authorities have asserted that that rule applies to the Panama Canal even without a treaty. We base our title upon the right of mankind in the Isthmus, treaty or no treaty. We have long asserted, beginning with Secretary Cass, that the nations of Central America had no right to debar the world from its right of passage across the Isthmus. Upon that view, in the words which I have quoted from President Roosevelt's message to Congress, we base the justice of our entire action upon the Isthmus which resulted in our having the Canal Zone. We could not have taken it for our selfish interest; we could not have taken it for the purpose of securing an advantage to the people of the United States over the other peoples of the world; it was only because civilization had its rights to passage across the Isthmus and because we made ourselves the mandatory of civilization to assert those rights that we are entitled to be there at all. On the principles which underlie our action and upon all the declarations that we have made for more than half a century, as well as upon the express and positive stipulations of our treaties, we are forbidden to say we have taken the custody of the Canal Zone to give ourselves any right of preference over the other civilized nations of the world beyond those rights which go to the owner of a canal to have the tolls that are charged for passage.

Asserting that we were acting for the common benefit of mankind, willing to accept no preferential right of our own, just as we asserted it to secure the Clayton-Bulwer

Treaty, just as we asserted it to secure the Hay-Pauncefote Treaty, when we had recognized the Republic of Panama, we made a treaty with her on the 18th of November, 1903. I ask your attention now to the provisions of that treaty. In that treaty both Panama and the United States recognize the fact that the United States was acting, not for its own special and selfish interest, but in the interest of mankind.

The suggestion has been made that we are relieved from the obligations of our treaties with Great Britain because the Canal Zone is our territory. It is said that, because it has become ours, we are entitled to build the canal on our own territory and do what we please with it. Nothing can be further from the fact. It is not our territory, except in trust. Article 2 of the treaty with Panama provides:

The Republic of Panama grants to the United States in perpetuity the use, occupation, and control of a zone of land and land under water for the construction, maintenance, operation, sanitation, and protection of said canal—and for no other purpose—of the width of 10 miles extending to the distance of 5 miles on each side of the centre line of the route of the canal to be constructed.

* * * * *

The Republic of Panama further grants to the United States in perpetuity the use, occupation, and control of any other lands and waters outside the zone above described which may be necessary and convenient for the construction, maintenance, operation, sanitation, and protection of the said canal or of any auxiliary canals or other works necessary and convenient for the construction, maintenance, operation, sanitation, and protection of the said enterprise.

Article 3 provides:

The Republic of Panama grants to the United States all the rights, power, and authority within the zone mentioned and described in Article 2 of this agreement—from which I have just read—and within the limits of all auxiliary lands and waters mentioned and described in said Article 2 which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power, or authority.

Article 5 provides:

The Republic of Panama grants to the United States in perpetuity a monopoly for the construction, maintenance, and operation of any system of communication by means of canal or railroad across its territory between the Caribbean Sea and the Pacific Ocean.

I now read from Article 18:

The canal, when constructed, and the entrances thereto shall be neutral in perpetuity, and shall be opened upon the terms provided for by section 1 of article 3 of, and in conformity with all the stipulations of, the treaty entered into by the Governments of the United States and Great Britain on November 18, 1901.

Far from our being relieved of the obligations of the treaty with Great Britain by reason of the title that we have obtained to the Canal Zone, we have taken that title impressed with a solemn trust. We have taken it for no purpose except the construction and maintenance of a canal in accordance with all the stipulations of our treaty with Great Britain. We cannot be false to those stipulations without adding to the breach of contract a breach of the trust which we have assumed, according to our own declarations, for the benefit of mankind as the mandatory of civilization.

In anticipation of the plainly-to-be-foreseen contingency of our having to acquire some kind of title in order to construct the canal, the Hay-Pauncefote Treaty provided expressly in Article 4:

It is agreed that no change of territorial sovereignty or of international relations of the country or countries traversed by the before-mentioned canal shall affect the general principle of neutralization or the obligation of the high contracting parties under the present treaty.

So you will see that the treaty with Great Britain expressly provides that its obligations shall continue, no matter what title we get to the Canal Zone; and the treaty by which we get the title expressly impresses upon it as a trust the obligations of the treaty with Great Britain. How idle it is to say that because the Canal Zone is ours we can do with it what we please.

There is another suggestion made regarding the obligations of this treaty, and that is that matters relating to the coasting trade are matters of special domestic concern,

and that nobody else has any right to say anything about them. We did not think so when we were dealing with the Canadian canals. But that may not be conclusive as to rights under this treaty. But examine it for a moment.

It is rather poverty of language than a genius for definition which leads us to call a voyage from New York to San Francisco, passing along countries thousands of miles away from our territory, "coasting trade," or call a voyage from New York to Manila, on the other side of the world, "coasting trade." When we use the term "coasting trade" what we really mean is that under our navigation laws a voyage which begins and ends at an American port has certain privileges and immunities and rights, and it is necessarily in that sense that the term is used in this statute. It must be construed in accordance with our statutes.

This is a special, peculiar kind of trade which passes through the Panama Canal. You may call it "coasting trade," but it is unlike any other coasting trade. It is special and peculiar to itself.

Grant that we are entitled to fix a different rate of tolls for that class of trade from that which would be fixed for other classes of trade. Ah, yes; but Great Britain has her coasting trade through the canal under the same definition, and Mexico has her coasting trade, and Germany has her coasting trade, and Colombia has her coasting trade, in the same sense that we have. You are not at liberty to discriminate in fixing tolls between a voyage from Portland, Me., to Portland, Ore., by an American ship, and a voyage from Halifax to Victoria in a British ship, or a voyage from Vera Cruz to Acapulco in a Mexican ship, because when you do so you discriminate, not between coasting trade and other trade, but between American ships and British ships, Mexican ships, or Colombian ships. That is a violation of the rule of equality which we have solemnly adopted, and asserted and reasserted, and to which we are bound by every consideration of honor and good faith. Whatever this treaty means, it means for that kind of trade as well as for any other kind of trade.

The Suez convention, from which these rules of the Hay-Pauncefote treaty were taken almost—though not quite—textually, contained other provisions which reserved to Turkey and to Egypt, as sovereigns of the territory

through which the canal passed—Egypt as the sovereign and Turkey as the suzerain over Egypt—all of the rights that pertained to sovereigns for the protection of their own territory. As when the Hay-Pauncefote Treaty was made neither party to the treaty had any title to the region which would be traversed by the canal, no such clauses could be introduced. But, as was pointed out, the rules which were taken from the Suez Canal for the control of the canal management would necessarily be subject to these rights of sovereignty which were still to be secured from the countries owning the territory. That is recognized by the British Government in the note which has been sent to us and as been laid before the Senate, or is in the possession of the Senate, from the British foreign office.

We have another treaty, made between the United States and Great Britain on the 4th of April, 1908, in which the two nations have agreed as follows:

Differences which may arise of a legal nature or relating to the interpretation of treaties existing between the two contracting parties and which it may not have been possible to settle by diplomacy, shall be referred to the Permanent Court of Arbitration established at The Hague by the convention of the 29th of July, 1899, provided, nevertheless, that they do not affect the vital interests, the independence, or the honor of the two contracting States, and do not concern the interests of third parties.

Of course, the question of the rate of tolls on the Panama Canal does not affect any nation's vital interests. It does not affect the independence or the honor of either of these contracting States. We have a difference relating to the interpretation of this treaty, and that is all there is to it. We are bound, by this treaty of arbitration, not to stand with arrogant assertion upon our own Government's opinion as to the interpretation of the treaty, not to require that Great Britain shall suffer what she deems injustice by violation of the treaty, or else go to war. We are bound to say, "We keep the faith of our treaty of arbitration, and we will submit the question as to what this treaty means to an impartial tribunal of arbitration."

If we stand in the position of arrogant refusal to submit the questions arising upon the interpretation of this treaty to arbitration, we shall not only violate our solemn obligation, but we shall be false to all the principles that we

have asserted to the world, and that we have urged upon mankind. We have been the apostle of arbitration. We have been urging it upon the other civilized nations, Presidents, Secretaries of State, Ambassadors, and Ministers—aye, Congresses, the Senate and the House, all branches of our Government have committed the United States to the principle of arbitration irrevocably, unequivocally, and we have urged it in season and out of season on the rest of mankind.

I cannot detain the Senate by more than beginning upon the expressions that have come from our Government upon this subject, but I will ask your indulgence while I call your attention to a few selected from the others.

On the 9th of June, 1874, the Senate Committee on Foreign Relations reported and the Senate adopted this resolution:

Resolved, That the United States having at heart the cause of peace everywhere, and hoping to help its permanent establishment between nations, hereby recommend the adoption of arbitration as a great and practical method for the determination of international difference, to be maintained sincerely and in good faith, so that war may cease to be regarded as a proper form of trial between nations.

On the 17th of June, 1874, the Committee on Foreign Affairs of the House adopted this resolution:

Whereas war is at all times destructive of the material interests of a people, demoralizing in its tendencies, and at variance with an enlightened public sentiment; and whereas differences between nations should in the interests of humanity and fraternity be adjusted, if possible, by international arbitration: Therefore,

Resolved, That the people of the United States being devoted to the policy of peace with all mankind, enjoining its blessings and hoping for its permanence and its universal adoption, hereby through their representatives in Congress recommend such arbitration as a rational substitute for war; and they further recommend to the treaty-making power of the Government to provide, if practicable, that hereafter in treaties made between the United States and foreign powers war shall not be declared by either of the contracting parties against the other until efforts shall have been made to adjust all alleged cause of difference by impartial arbitration.

On the same 17th of June, 1874, the Senate adopted this resolution:

Resolved, etc., That the President of the United States is hereby authorized and requested to negotiate with all civilized powers who may be willing to enter into such negotiations for the establishment of an international system whereby matters in dispute between different Governments agreeing thereto may be adjusted by arbitration, and, if possible, without recourse to war.

On the 14th of June, 1888, and again on the 14th of February, 1890, the Senate and the House adopted a concurrent resolution in the words which I now read:—

Resolved by the Senate (the House of Representatives concurring), That the President be, and is hereby, requested to invite, from time to time, as fit occasions may arise, negotiations with any Government with which the United States has, or may have, diplomatic relations, to the end that any differences or disputes arising between the two Governments which cannot be adjusted by diplomatic agency may be referred to arbitration and be peaceably adjusted by such means.

This was concurred in by the House on the 3rd April, 1890.

In pursuance of those declarations by both Houses of Congress the Presidents and the Secretaries of State and the diplomatic agents of the United States, doing their bounden duty, have been urging arbitration upon the people of the world. Our representatives in The Hague conference of 1899, and in The Hague conference of 1907, and in the Pan American conference in Washington, and in the Pan American conference in Mexico, and in the Pan American conference in Rio de Janeiro were instructed to urge and did urge and pledge the United States in the most unequivocal and urgent terms to support the principle of arbitration upon all questions capable of being submitted to a tribunal for a decision.

Under those instructions Mr. Hay addressed the people of the entire civilized world with the request to come into treaties of arbitration with the United States. Here was his letter. After quoting from the resolutions and from expressions by the President he said:

“Moved by these views, the President has charged me to instruct you to ascertain whether the Government to which

you are accredited, which he has reason to believe is equally desirous of advancing the principle of international arbitration, is willing to conclude with the Government of the United States an arbitration treaty of like tenor to the arrangement concluded between France and Great Britain on October 14, 1903."

That was the origin of this treaty. The treaties made by Mr. Hay were not satisfactory to the Senate because of the question about the participation of the Senate in the make-up of the special agreement of submission. Mr. Hay's successor modified that on conference with the Committee on Foreign Relations of the Senate, and secured the assent of the other countries of the world to the treaty with that modification. We have made 25 of these treaties of arbitration, covering the greater part of the world, under the direction of the Senate of the United States and the House of Representatives of the United States and in accordance with the traditional policy of the United States, holding up to the world the principle of peaceful arbitration.

One of these treaties is here, and under it Great Britain is demanding that the question as to what the true interpretation of our treaty about the canal is shall be submitted to decision and not be made the subject of war or of submission to what she deems injustice to avoid war.

In response to the last resolution which I have read, the concurrent resolution passed by the Senate and the House requesting the President to enter into the negotiations which resulted in these treaties of arbitration, the British House of Commons passed a resolution accepting the overture. On the 16th of July, 1893, the House of Commons adopted this resolution:

Resolved, That this house has learnt with satisfaction that both Houses of the United States Congress have, by resolution, requested the President to invite from time to time, as fit occasions may arise, negotiations with any government with which the United States have or may have diplomatic relations, to the end that any differences or disputes arising between the two governments which cannot be adjusted by diplomatic agency may be referred to arbitration and peaceably adjusted by such means, and that this house, cordially sympathizing with the purpose in view, expresses the hope that Her Majesty's Government will lend their

ready co-operation to the Government of the United States upon the basis of the foregoing resolution.

Her Majesty's Government did, and thence came this treaty.

What revolting hypocrisy we convict ourselves of, if after all this, the first time there comes up a question in which we have an interest, the first time there comes up a question of difference about the meaning of a treaty as to which we fear we may be beaten in an arbitration, we refuse to keep our agreement? Where will be our self-respect if we do that? Where will be that respect to which a great nation is entitled from the other nations of the earth?

I have read from what Congress has said.

Let me read something from President Grant's annual message of December 4, 1871. He is commenting upon the arbitration provisions of the treaty of 1871, in which Great Britain submitted to arbitration our claims against her, known as the Alabama claims, in which Great Britain submitted those claims where she stood possibly to lose but not possibly to gain anything, and submitted them against the most earnest and violent protest of many of her own citizens. Gen. Grant said: "The year has been an eventful one in witnessing two great nations speaking one language and having one lineage, settling by peaceful arbitration disputes of long standing and liable at any time to bring those nations into costly and bloody conflict. An example has been set which, if successful in its final issue, may be followed by other civilized nations and finally be the means of returning to productive industry millions of men now maintained to settle the disputes of nations by the bayonet and by broadside."

Under the authority of these resolutions our delegates in the first Pan American conference at Washington secured the adoption of this resolution April 18, 1890:

Article 1. The Republics of North, Central, and South America hereby adopt arbitration as a principle of American international law for the settlement of the differences, disputes, or controversies that may arise between two or more of them:

And this:

The International American Conference resolves that this conference, having recommended arbitration for the settlement of disputes among the Republics of America,

begs leave to express the wish that controversies between them and the nations of Europe may be settled in the same friendly manner.

It is further recommended that the Government of each nation herein represented communicate this wish to all friendly powers.

Upon that Mr. Blaine, that most vigorous and virile American, in his address as the presiding officer of that first Pan American conference in Washington said:

"If, in this closing hour, the conference had but one deed to celebrate we should dare call the world's attention to the deliberate, confident solemn dedication of two great continents to peace and to the prosperity which has peace for its foundation. We hold up this new Magna Charta, which abolishes war and substitutes arbitration between the American Republics, as the first and great fruit of the International American Conference. That noblest of Americans, the aged poet and philanthropist, Whittier, is the first to send his salutation and his benediction, declaring, "If in the spirit of peace the American conference agrees upon a rule of arbitration which shall make war in this hemisphere well-nigh impossible, its sessions will prove one of the most important events in the history of the world."

President Arthur in his annual message of December 4, 1882, said, in discussing the proposition for a Pan American conference:

"I am unwilling to dismiss this subject without assuring you of my support of any measure the wisdom of Congress may devise for the promotion of peace on this continent and throughout the world, and I trust the time is nigh when, with the universal assent of civilized peoples, all international differences shall be determined without resort to arms by the benignant processes of arbitration."

President Harrison in his message of December 3, 1889, said concerning the Pan American conference:

"But while the commercial results which it is hoped will follow this conference are worthy of pursuit and of the great interests they have excited, it is believed that the crowning benefit will be found in the better securities which may be devised for the maintenance of peace among all American nations and the settlement of all contentions by methods that a Christian civilization can approve."

President Cleveland, in his message of December 4, 1893, said, concerning the resolution of the British Parliament of July 16, 1893, which I have already read, and commenting on the concurrent resolution of February 14 and April 18, 1890:

"It affords me signal pleasure to lay this parliamentary resolution before the Congress and to express my sincere gratification that the sentiment of two great kindred nations is thus authoritatively manifested in favour of the rational and peaceable settlement of international quarrels by honourable resort to arbitration."

President McKinley, in his message of December 6, 1897, said:

"International arbitration cannot be omitted from the list of subjects claiming our consideration. Events have only served to strengthen the general views on this question expressed in my inaugural address. The best sentiment of the civilized world is moving toward the settlement of differences between nations without resorting to the horrors of war. Treaties embodying these humane principles on broad lines without in any way imperiling our interests or our honour shall have my constant encouragement."

President Roosevelt, in his message of December 3, 1905, said:

"I earnestly hope that the conference—the second Hague conference—may be able to devise some way to make arbitration between nations the customary way of settling international disputes in all save a few classes of cases, which should themselves be sharply defined and rigidly limited as the present governmental and social development of the world will permit. If possible, there should be a general arbitration treaty negotiated among all nations represented at the conference."

Oh, Mr. President, are we Pharisees? Have we been insincere and false? Have we been pretending in all these long years of resolution and declaration and proposal and urgency for arbitration? Are we ready now to admit that our country, that its Congresses and its Presidents, have all been guilty of false pretense, of humbug, of talking to the galleries, of fine words to secure applause, and that the instant we have an interest we are ready to falsify every declaration, every promise, and every principle? But we must do that if we arrogantly insist that we alone will determine upon the

interpretation of this treaty and will refuse to abide by the agreement of our treaty of arbitration.

What is all this for? Is the game worth the candle? It is worth while to put ourselves in a position and to remain in a position to maintain which we may be driven to repudiate our principles, our professions, and our agreements for the purpose of conferring a money benefit—not very great, not very important, but a money benefit—at the expense of the Treasury of the United States, upon the most highly and absolutely protected special industry in the United States? Is it worth while? We refuse to help our foreign shipping, which is in competition with the lower wages and the lower standard of living of foreign countries, and we are proposing to do this for a part of our coastwise shipping which has now by law the absolute protection of a statutory monopoly and which needs no help.

There is but one alternative consistent with self-respect. We must arbitrate the interpretation of this treaty or we must retire from the position we have taken.

O Senators, consider for a moment what it is that we are doing. We all love our country; we are all proud of its history; we are all full of hope and courage for its future; we love its good name; we desire for it that power among the nations of the earth which will enable it to accomplish still greater things for civilization than it has accomplished in its noble past. Shall we make ourselves in the minds of the world like unto the man who in his own community is marked as astute and cunning to get out of his obligations? Shall we make ourselves like unto the man who is known to be false to his agreements; false to his pledged word? Shall we have it understood the whole world over that “you must look out for the United States or she will get the advantage of you;” that we are clever and cunning to get the better of the other party to an agreement, and that at the end—shall we in our generation add to those claims to honour and respect that our fathers have established for our country good cause that we shall be considered slippery?

It is worth while, Mr. President, to be a citizen of a great country, but size alone is not enough to make a country great. A country must be great in its ideals; it must be great-hearted; it must be noble; it must despise and reject all smallness and meanness; it must be faithful to its word; it must keep the faith of treaties; it must be faithful to its

mission of civilization in order that it shall be truly great. It is because we believe that of our country that we are proud, aye, that the alien with the first step of his foot upon our soil is proud to be a part of this great democracy.

Let us put aside the idea of small, petty advantage; let us treat this situation and these obligations in our relation to this canal in that large way which befits a great nation.

How sad it would be if we were to dim the splendor of that great achievement by drawing across it the mark of petty selfishness; if we were to diminish and reduce for generations to come the power and influence of this free Republic for the uplifting and the progress of mankind by destroying the respect of mankind for us! How sad it would be if you and I, Senators, were to make ourselves responsible for destroying that bright and inspiring ideal which has enabled free America to lead the world in progress toward liberty and justice!

DEATH OF LORD MACNAGHTEN.

We announce with much regret that Lord Macnaghten, a Lord of Appeal in Ordinary, died recently at his house in Queen's-gate, London England. He had been ill for about a fortnight, but it was not until a few hours before his end that grave fears were entertained as to his ultimate recovery.

The death of Lord Macnaghten is perhaps the heaviest loss which the English Bench could have sustained, and it is hardly too much to say that since the death of Lord Watson in September, 1899, he was the greatest of British Judges. Certainly in the combination of literary gifts with legal learning Lord Macnaghten has had, during the present generation, few rivals, the only names which suggest themselves being those of Lord Justice James and Lord Bowen. Fewer still among lawyers have had so enviable a career. Brilliant forensic and judicial success is usually purchased at the price of excessive and unwholesome labour and strenuous self-assertive competition. At no time could the words have been

applied to Macnaghten—*noctes atque dies niti praestante labore*; for throughout his career he never seemed to be overworked, and always gave the impression of a man with plenty of leisure. Fortunately, having from the first been in easy circumstances, he was able to indulge that passion for perfection in the quality of his work which is rarely found in pushing advocates who make their way to the Bench. He reached the position for which he was most qualified with no preliminary disappointment, and he lived for many years in the unobtrusive discharge of the highest form of judicial duty.

BUILDING UP A LAW PRACTICE.

BY LEMUEL H. FOSTER,

Of the Detroit Bar.

This subject is so broad in its scope that to touch even lightly upon its various phases would require more space than can be devoted to a magazine article. We shall therefore take up that branch of the subject which will be most useful to the young lawyer who is about to enter actively upon the practice of his profession, pointing out briefly the things which will contribute most strongly to the successful upbuilding of a substantial law practice, and pointing out some of the things which will, if not avoided, tend to exert an unfavourable influence over his career.

A lawyer's success or failure is brought about by so many concurring circumstances and conditions that it would be very difficult to determine which of these circumstances or conditions exercised the greatest influence.

The lawyer's own personalty and habits; his environment; his ability to make and keep friends; to impress people with his knowledge of the law; his honesty and faithfulness; his habits of promptness and industry, or the lack of these various qualities,—have everything to do in making him a success or failure.

Opportunity is also a factor, and influential friends are useful; but without honesty, industry, faithfulness, knowledge of the law, and ability to apply his knowledge, the lawyer will not attain a high rank in his profession.

A lawyer's success or failure may, in a great measure, depend upon his environment; therefore the choice of a location in which to begin practice should have his most careful consideration. Family ties or the wishes of influential friends may induce him to begin practice in a place which he would not have otherwise considered, and time alone will demonstrate whether he was wise in deferring to the wishes of his friends.

But if the young lawyer is free to decide for himself, he should go into the matter in a business-like way. He should appreciate the fact that he may be successful in one community and unsuccessful in another. If he is a man of push and energy, with a vigorous body and a liking for the strenuous life of a large city, he would not be satisfied with the quiet of a small place. If, on the other hand, he is a man of quiet, studious habits, or of a retiring nature, he will find his appropriate field in a smaller place.

Therefore in choosing a location the lawyer should consider his abilities and temperament, and endeavour to finally settle in a community where the surroundings are congenial, and where he will be brought into relations with the class of people which he most thoroughly understands, and who will understand and appreciate him. But whether he decides to locate in a large or small place, he should, before finally deciding, take ample time to become thoroughly acquainted with the conditions that exist in the place under consideration. He should know whether the town is prosperous or otherwise; whether the conditions are such as to warrant the belief in its continued prosperity; whether the lines of business carried on are such as to create a considerable demand for legal services, and whether the social and moral conditions are satisfactory.

Having determined upon a location, the next step is the selection of an office.

It is a very common practice for young lawyers, especially in the city, to take desk room with some older lawyer, often rendering services in lieu of rent. Unless his financial condition makes it necessary for him to do so, this practice should be avoided. The young lawyer under this arrangement appears to be a dependent or employee, and is apt to be so regarded. This may result in his losing business which he might receive under other circumstances, and it will certainly deprive him of that spirit of independence

and responsibility which is absolutely necessary for a successful career. There are many lawyers who have spent their best years in the anteroom of other lawyers, eking out a miserable existence from the small fees received from the poorer class of clients or from an ill-paid class of business, and the unprofitable or unpleasant matters doled out by the prosperous proprietor of the office.

The lawyer, whether he be a beginner or otherwise, should have an office which is his own. It may be in a suite of offices which he occupies on equal terms with other lawyers, or an office alone, but no matter how unpretentious it may be it should be his. He should be free to dictate as to its management, and to select the people with whom he is surrounded.

The lawyer's office should be in a building occupied by lawyers, centrally located, and as prominent as his financial condition will permit, and if possible where he will be brought into contact and association with the best class of practitioners and business men.

People are very prone to judge of a lawyer's standing by his surroundings and associations, and this is especially true as regards his office. And, too, continual contact with the better class of lawyers will naturally result in forming an acquaintance with them, and the friendship and good will of such lawyers is very desirable.

The furnishings should be selected with a view of utility and service, and of a character suitable for a law office. Ostentatious display should be avoided. If pictures are hung on the walls they should be such as are suitable for a lawyer's office, such as portraits of eminent Judges or statesmen, or subjects of a legal nature.

It is a mistake to think that an elegantly furnished office will bring business, for in fact it may have the opposite effect, as people of ordinary means may fear that the lawyer who maintains an elegant office must be high in his charges for services; and while a lawyer should charge and receive a fair compensation for his services, a reputation for making excessive charges will be disastrous.

After securing and furnishing an office the selection of a library follows naturally, and this is a matter which should receive very careful consideration.

Whether the amount of money available for the purchase of books be large or small, haste should be avoided. Worth-

less books or books which will be seldom, if ever, used, should not be bought simply to make a display.

The first purchases should consist of the statutes, reports of the Courts of last resort, digests, and works on the practice of the state where he is located. These are absolutely necessary. Subsequent purchases should be made after full consideration of his own line of practice, and he should endeavour to ascertain what books will be really useful to him and those that will not. There is in nearly every lawyer's library more or less books which are never used. They take up room and accumulate dust. The money invested in them was wasted.

The examination of a few law libraries will give a very fair idea of which books are really useful and those which are seldom, if ever, referred to. The knowledge thus acquired will be of great assistance in selecting a live, up-to-date working library.

Second-hand books, unless last editions, are not as a rule desirable, though there are a number of standard works on pleading, evidence, etc., which have become classics and are always good in states which retain the common-law practice.

Annotated editions of statutes and reports are desirable. Some digests are good, but they should be used for the purpose for which they were made; that is, to enable the lawyer to find the cases upon a certain question in a group; but these cases should be examined carefully before being used as a reference, or cited as authority in a brief or argument. The proposition may be correctly stated in the digest, while the effect of the opinion as a whole may be most favourable to the other side of the proposition, or of such a nature as to be worthless as an authority.

Another item of equipment is the stationery, which should be as good as circumstances will permit. Letter paper, envelopes, and cards should be of good quality, and the subject-matter, whether printed or engraved, should be dignified and brief. The appearance of a lawyer's stationery has much to do in making an impression, favourable or otherwise, upon correspondents to whom he is not known personally.

Correspondence should be concise and to the point. Each letter should relate to but one matter, and should

cover all the necessary points under consideration in a logical sequence, with as few words as possible. Reference should be made to the correspondent's file number or designation as shewn by his letters. This may appear to be a trivial detail, but it is not so regarded in large offices.

All letters should have prompt attention and be answered the day they are received. If the matter referred to requires investigation, or for any reason the letter cannot be answered immediately, its receipt should be acknowledged and a reply forwarded as soon as possible. In the business world of to-day the watchwords are "promptness" and "progress." Business men are continually studying and experimenting to bring about a higher state of efficiency in their respective lines, and in training their employees as well as themselves along lines which will produce the greatest and best results with a minimum amount of labour. By constant study and practice, and by the use of modern devices, business men are enabled to do a very much larger amount of work in a given time than formerly, without any more, if as much, effort. Many lawyers have kept pace with the business men in developing habits of order, promptness, and high efficiency in their offices, and it will be found that the greater number of successful lawyers are found in this class.

System in the office is one of the most important details, the lack of which will soon develop a confusion and disorder which will greatly increase the labour of the office, and may result in a loss of clients and business.

A busy man will not wait patiently while a frantic search is being made through a disorderly mass of files for some important paper which is wanted immediately. There should be some system in the office which will make it possible to at once find any paper, letter, file, or item of business. Such a system may be easily found, and they are so arranged that they may be started to meet the requirements of a small office and enlarged as the business increases, without changing the details of the system.

Some systems are better than others; a little careful study will enable one to select the one which appears to be best adapted to his needs; but whatever system may be adopted, it should be carefully adhered to from the beginning. In no other way can confusion be avoided.

In selecting a system for a law office, care should be taken to select one which is not too complicated. A system which might be very necessary in a large business office may be too cumbersome for a lawyer's office. The less there is of minute detail the better, provided always there is sufficient detail to insure immediate access to what is wanted.

Another very important detail of a law office is the handling of the finances; and this applies not only to the lawyer's personal and office expenses, but also to the moneys belonging to clients and to estates.

The lawyer should endeavour to keep out of debt, and not to contract financial obligations which he cannot reasonably expect to meet as they mature. A reputation of paying his bills is a valuable asset to a lawyer.

All moneys received by a lawyer in a trust capacity should be kept separate from his own funds, and he should never allow his necessities to tempt him to tamper with such funds in the slightest particular, or to use them for his own purposes.

General collections should be deposited in a bank separate from his other account, and the funds of estates should be kept each in a separate account; for example, John Doe, as administrator, executor, or trustee of the estate of Richard Doe, or if acting as agent, attorney in fact, or trustee for an individual, the account should be opened with the proper designation, for example, John Doe, as attorney, agent, or trustee of Richard Roe.

By strictly adhering to this practice, confusion of accounts will be avoided; and in the event of the death of the attorney, the several funds for which he was responsible will be intact, thus avoiding serious complications in settling his estate, as well as possible loss to his bondsmen.

A Chicago lawyer once remarked during a heated discussion of the terms of a ninety-nine year lease, that he wanted to so conduct the matter that there would be no irate client dancing on his grave. Perhaps this is not a very elegant way of putting it, but it illustrates very forcibly the duty of a lawyer, not only to himself, but to his clients; that is, that he should so manage his affairs and the affairs of his clients that no act of his, either of commission or omission, will arise to sully his good name after he is gone.

Making and retaining clients is an art which must be cultivated and perfected in order to insure lasting success, and full details and specifications shewing how to acquire this art and how to apply it have appeared in various legal publications. But when all is said, it will be found that the lawyer must frame up his own specifications and learn the art in his own way, developing it through his own experience. A pleasing personality is always an asset. A reputation for promptness, honesty, and integrity is invaluable, especially when deserved; knowledge of the law and ability to apply this knowledge effectively is also a factor.

The possession of these qualities with a sufficient amount of assurance (but not too much); a well-ordered private as well as public and professional life, with courtesy toward and consideration for those with whom he is brought in contact in business or otherwise, will do much toward building up a desirable clientage.

The art of keeping clients is fully as difficult to acquire as the art of making them, and calls for the exercise of an entirely different set of faculties. A man may go to a lawyer once and never go again; another man may go once and continue doing so for many years. In the first instance, there was some element of attraction missing which it may have been impossible for the lawyer to supply; in the second instance, this element of attraction was present. Possibly the lawyer was wholly unconscious of the fact that he was exercising any influence whatever over the parties. He was probably unaware that something in his manner, or his treatment, or his own personality, was repelling one client or making an unfavourable impression upon him; and he may have been equally ignorant of the fact that, in the case of the other client, he was creating a favourable impression, or the reason for it. Now if the lawyer will study the people who come to his office and endeavour to know their peculiarities, their likes, dislikes, and prejudices, he will be able to avoid saying or doing things which may offend or prejudice them, or, on the other hand, say or do things which will please. A manner which will please one person may displease another; treatment which will make a client of one person may repel some other person. The only way is to treat everyone courteously, and learn to know from association how to treat each individual client.

In the ordinary office the clients will be divided somewhat into classes, i.e., men of large affairs, the average run of business men, retired business men, and men who are not in business, and women; each class requiring different treatment. The man of large affairs will resent familiarity, while he will have contempt for cringing to his wealth or power, though he may have a certain amount of vanity which may be successfully appealed to.

The ordinary run of business men are inclined to be respectful, and they will be grateful for a little unbending upon the part of their legal adviser; but too much familiarity upon his part will cause the loss of respect.

Women, and men who are not in business and who have a limited knowledge of business methods, require careful treatment. To them, going to a lawyer's office is a solemn occasion, and the business which makes the visit necessary is, in their estimation, of the greatest importance. They doubtless have made many inquiries about the lawyer upon whom they propose to confer the favour of a call, and have more or less doubt as to whether he is fully capable of handling their business in the proper manner, and whether his charges will be reasonable. With people of this class great patience and tact is necessary. Their fears must be dispelled and their confidence secured. To them, their troubles are very real and the importance of their case very great. To treat them as though their matters are unimportant will be fatal to any prospect of securing them as clients; and a young lawyer can have no better or helpful friends than clients of this class, if he can please them and gain their confidence.

In this connection it should be remembered that to advise intelligently one should be a good listener. Advice given without knowledge of all the facts may lead to serious results.

Clients as a rule are anxious to tell all the details of their troubles, many of which may be unimportant; but usually the easiest way to get at the facts is to let them talk. It makes them feel better, and they will think more of the lawyer if he lets them go on, than they would if he cut them short. Even then it may be necessary to question the client closely as to details which to him may seem to be of no importance, or as having no bearing on the case, but which

may really be of very great value in enabling the lawyer to form a correct opinion.

Young lawyers are somewhat diffident about examining authorities in the presence of clients; they feel that by so doing they appear to be ignorant of the law applicable to the case and will lose the confidence of the client. This is a mistake. An opinion should never be given without a clear understanding of the law applicable to the facts under consideration. There should be no hesitation about consulting authorities in presence of the client if by so doing the questions involved can be settled at once. If more extended research is required the client should be so advised and the opinion given later.

The lawyer should be the dictator as regards the bringing of suits or the course of procedure to be followed in matters placed in his hands. He should not be obstinate simply to have his own way, but he should in every case determine, after careful consideration, what course should be pursued in a given case, and then follow that course, unless he becomes convinced that some other course is better. He should not permit himself to be forced into commencing legal proceedings in cases where the facts do not warrant his so doing, even though his client insists upon it. He should not allow himself to be used as an instrument of malicious oppression, extortion, or blackmail. His first and paramount duty is to himself, and he has the right to decline any case which does not appear to be founded on right and justice, or the object of which appears to be the use of the Courts and their machinery for improper purposes, or which will tend to injure his reputation.

A lawyer should never slight his work. He should do his best in all cases and under all circumstances. He should never commence an action until he is sure which is the best form of action to be adopted. He should be sure that every step is properly taken and at the right time, that the proper parties are joined, and that his pleadings are correct as to form and scope. He should never go into Court without full preparation.

In the office he should see that everything is properly done. That his correspondence is kept up promptly, that every legal instrument is properly drafted and executed; that contracts, wills, and other instruments fully and clearly express the terms, conditions, and intentions of the parties,

so that no necessity will ever arise for a judicial interpretation of the instrument to ascertain its meaning, scope, or effect. He should see that his office is kept neat and orderly, and that his employees are neat, orderly, and polite to clients. He should see that his books of account and records are as accurately kept as those of a well-ordered business establishment. He should make promptness and despatch the rule of his office, and not tolerate procrastination or delay. He should keep his appointments to the minute, and never make an appointment which he is not able to meet, nor make a promise which he is not reasonably sure he will be able to fulfil.

In his dealings with the Courts his duty demands the strictest honesty and good faith. His intercourse with his brethren of the Bar should be governed by considerations of mutual forbearance, accommodation, and fairness.

His duty to the public demands that he should be a good citizen, always ready to lend his aid in promoting everything which will tend to the maintenance of good government and the correction of existing evils.

His private as well as his public and professional life should be above reproach.

THE TAXATION OF LAND VALUES.

By LOUIS F. POST.

One of the methods of raising public revenues is by land value taxation.

Land value taxation is any tax levied on landowners in proportion to the value of their land, irrespective of its improvements.

In most countries land value taxes are familiar enough in connection with other taxes. This is so in the United States, where real estate taxes are (a) in part taxes according to the value of improvements, and (b) in part taxes according to the value of land.

Land value taxation may thus supply (a) a greater or less proportion of the public revenues, the rest being obtained from taxes on improvements, personal property, incomes,

business licenses, and so on; or (b) it may be exclusive, public revenues being raised from no other source.

When land value taxation is exclusive, it is appropriately enough called "the single tax," meaning only one tax and that upon land values.

The single tax (exclusive land value taxation) may vary in degree, from (a) a rate that will supply revenues sufficient only for the bare needs of government, to (b) a rate high enough to appropriate to public use approximately the entire annual value of land.

The annual needs of a government might coincide approximately with the annual value of the land within its jurisdiction, in which case there would be no practical difference between a land value tax sufficient merely for public needs, and one high enough to appropriate approximately all annual land values. Theoretically, however, the difference is to be observed; for there is a difference in theory and there might be in practice.

We may make the following enumeration of different kinds or degrees of land value taxation:

1. Land value taxation, together with taxation on improvements and personal property. This is commonly known as the "general property tax."

2. Land value taxation, together with taxation on improvements, personal property being disregarded or exempt. This is commonly known as the real estate tax.

3. Land value taxation, to the exclusion of all other revenue taxes, but limited to the needs of government. This may be distinguished as the "single tax limited."

4. Land value taxation, whether exclusively such or not, which begins with a low rate or none on land of moderate value, and increases progressively in rate on land of higher values, with a view to encouraging small holdings and discouraging large ones, is known as the "progressive land value tax."

5. Land value taxation, to the exclusion of all other revenue taxes, and to the full rental value approximately of the land. This might be called simply the "single tax."

Land value taxation to the exclusion of all other revenue taxes, but limited to the needs of government, was proposed by Henry George in "Progress and Poverty" in 1879, as the best known fiscal method, and one that would moreover, by force of its own excellence for revenue purposes, de-

velop into the simplest means of securing to the community as a whole the value of land, and to each individual the value of his work, thereby at once supplying abundant public revenues and settling the labour question on the basis of justice. Henry George expressed the idea in these words: "Abolish all taxation save that upon land values."

This proposal, long known as "the single tax," is coming to be better and more favourably known as "land value taxation." Under its operation all classes of workers, whether manufacturers, merchants, bankers, professional men, clerks, mechanics, farmers, farm hands, or other working classes, would, as such, be wholly exempt from taxation.

It is only as men own land that they would be taxed, the tax of each being in proportion, not to the area, but to the value of his land.

And no one would be compelled to pay a higher tax than others if his land were improved or used while theirs was not, nor if his were better improved or better used than theirs. The value of its improvements would not be considered in estimating the value of a holding; site value alone would govern. If a site rose in the market, the tax would proportionately increase; if it fell, the tax would proportionately diminish.

Land value taxation, therefore, when carried to the point of the single tax (whether limited or not) may be concisely defined as a tax upon land alone, in the ratio of value and irrespective of its improvements or its use.

To perceive that land value taxation would justly measure the value of public benefits which every individual respectively enjoys, we have only to consider that the mass of individuals everywhere and now, in paying for the land they use, actually pay for public benefits in proportion to what they receive.

He who would enjoy those benefits must use land where the benefits can be enjoyed. He cannot, for instance, carry land from where government is poor to where it is good; neither can he carry it from where the benefits of good government are few or enjoyed with difficulty to where they are many and fully enjoyed. He must rent or buy land where the benefits of government are available, or forego them. And unless he buys or rents where they are greatest or most available, he must forego them in degree. Consequently, if he would work or live where the benefits of

government are available, and does not already own land there, he will be compelled to rent or buy at a valuation which, other things being equal, will depend upon the value of the government service that the site he selects enables him to enjoy. Thus does he pay for the service of government in proportion to its value to him. But he does not pay the public, which provides the service; he is required to pay landowners.

The economic principle pursuant to which landowners are thus able to charge their fellow citizens for the common benefits of their common government points to the true method of taxation. With the exception of such other monopoly property as is analogous to land titles, and which in the purview of the single tax is included with land for purposes of taxation, land is the only kind of property that is increased in value by government; and the increase tends to be in proportion to the public service which its possession secures to the occupant.

Therefore, by taxing land in proportion to its value, and exempting all other property, kindred monopolies excepted—that is to say, by adopting exclusive land value taxation—we should be levying taxes according to benefits.

Nor would this be in any sense class taxation. Indeed, the cry of class taxation is rather impudent for owners of valuable land to raise against land value taxes, when it is considered that under existing systems of taxation such landowners are exempt.

Even the poorest and most degraded classes in the community, besides paying landowners for such public benefits as come their way, are compelled by indirect taxation to contribute to the support of government.

But landowners as a class go free. They enjoy the protection of the Courts and of the police and fire departments, and they have the use of schools and the benefit of highways and other public improvements, all in common with the most favoured, and upon the same specific terms; yet, though they go through the form of paying taxes, and if their holdings are of considerable value pose as “the taxpayers” on all important occasions, they, in effect, and considered as a class, pay no taxes. To tax them alone, therefore, is not to discriminate against them; it is to charge them for what they get from the public.

Land value taxation conforms most closely to the essential principles of Adam Smith's four classical maxims, which are stated by Henry George as follows:—

“The best tax by which public revenues can be raised is evidently that which will closest conform to the following conditions: (1) That it bear as lightly as possible upon production—so as least to check the increase of the general fund from which taxes must be paid and the community maintained. (2) That it be easily and cheaply collected, and fall as directly as may be upon the ultimate payers—so as to take from the people as little as possible in addition to what it yields to the Government. (3) That it be certain—so as to give the least opportunity for tyranny or corruption on the part of officials, and the least temptation to law-breaking and evasion on the part of the taxpayers. (4) That it bear equally—so as to give no citizen an advantage or put any at a disadvantage as compared with others.”

Indirect taxes tend to check production and to cause scarcity by obstructing the processes of production. They fall upon men as they work, as they do business, as they invest capital productively. But land value taxes which must be paid and be the same in amount regardless of whether the taxpayer works or plays, or whether he invests his capital productively or wastes it, or whether he uses his land for the most productive purposes or in lesser degree or not at all, lay no penalties upon industry and thrift. Therefore they conform to the first maxim quoted above.

Indirect taxes are passed along from first payers to final consumers through many exchanges, accumulating compound profits as they go, until they take enormous sums from the people in addition to what the Government receives. But land value taxes take nothing from the people in excess of the tax. Therefore they conform to the second maxim quoted above.

No other tax, direct or indirect, conforms so closely to the third maxim, “Land lies out of doors.” It cannot be hidden; it cannot be “accidentally” overlooked. Nor can its value be greatly misapprehended or misstated. Neither under-appraisement nor over-appraisement is possible to any important extent without the connivance of the whole community. The land values of a neighbourhood are matters of common knowledge. Any intelligent resident can justly appraise them, and every other intelligent

resident can fairly test the appraisement. Therefore the tyranny, corruption, fraud, favouritism, and evasions which are so common in connection with the taxation of imports, manufactures, incomes, personal property, and buildings—the values of which, even when the object itself cannot be hidden, are so distinctly matters of minute special knowledge that only experts can fairly appraise them—would be out of the question if land value taxation were substituted for existing fiscal methods.

In conforming to the fourth maxim, the land value tax bears more equally—that is to say, more justly—than any other tax. It is the only tax that falls upon the taxpayer in proportion to the pecuniary benefits he receives from the public, and its tendency, accelerating with increase of the tax, is to leave to everyone the full fruit of his own productive enterprise and effort.

TAXES AND PROSPERITY.

BY ALMOND G. SHEPARD.

The use of the words “taxes” and “prosperity” in conjunction suggests some obvious distinctions between them—taxes we have always with us; the tax collector is a constant visitor, always and generally at the most inopportune times, intruding upon us; prosperity, on the other hand, to the majority is either a total stranger or at the best a most infrequent visitor. To the tax collector the latch string is never out, while we meet prosperity with open arms if it comes our way.

While there are these and perhaps many other obvious distinctions between taxes and prosperity, nevertheless the one has a direct effect upon the other. The purpose of this article is briefly to comment upon the effect of taxes upon prosperity, and prosperity not only to the individual but to municipal corporations.

DEFECTS IN PRESENT METHODS.

To summarize, it is attempted to shew:—

1. That the present system of taxation favours the large cities, and discriminates against the smaller municipalities and rural districts.

2. Hence it is repressive of industrial growth in the small cities and villages, and is one of the principal causes for the constant flow of population to the large cities.

3. The present system of taxation discriminates against the poor and in favour of the rich.

4. It discriminates against the thrifty who acquire taxable property, in favour of people of larger incomes who pay no direct taxes.

The remedy may also be briefly summarized that the present system of taxation as it generally obtains is repression of prosperity for the following reasons:—

a. A highly progressive inheritance tax.

b. A more equable plan for assessing real and personal property.

c. An income tax.

d. A fixed maximum rate.

e. Concerted action by all the states for the purpose of uniformity in the rate of taxation and the means of raising same.

There is and always have been many variant opinions and theories as to the best manner of raising taxes, although all persons who have considered the subject are agreed that taxes should only be raised for strictly public purposes, and then in a manner requiring the least personal sacrifice, and in such a way as to be least suppressive of industrial and business progress and success. The present method of raising the bulk of taxes for local governmental purposes, by assessing real estate and different forms of personal property, including money, is subject to much criticism; while, on the other hand, it has the virtue of being one of the surest as well as one of the easiest ways of enforcing payment. This is especially true as to the taxation of real estate. This latter fact has caused this means of raising taxes to be very generally resorted to without reference to the injury thereby resulting to the industrial and social life of the people.

INEQUALITIES IN ASSESSING—CITY VS. COUNTRY.

Some of the defects in this system of raising the taxes are the inequalities in assessing and valuing real property, and even greater inequalities in the assessment of personal property, in that in many localities, especially the large

cities, as a rule no decided effort is made to assess personal property. Indeed the policy is the reverse—to permit personal property to go unassessed and hence untaxed. Then again in most localities, public service corporations, like common carriers and telegraph and telephone lines, are assessed on a different basis than other real and personal property, and are not assessed at all by local municipalities in which they may own property and have franchise rights, and from which they receive the same protection accorded property assessed for local purposes. Another defect in the present system of taxation is that while, as already stated, in the cities at least, personal property is not generally assessed, in the country districts and the smaller municipalities the reverse is true and here it is the exception rather than the rule for personal property to escape taxation.

And it is also true that in the country districts as a rule, especially in the villages and small cities, real estate is assessed for its full value and oftentimes more than its selling value, while in the city, owing in part to the policy of the assessing officers, and in part to the rapid increase in the value of real estate, it is very apt to be much under assessed.

Another defect in the present system of taxing property which has a bad effect upon the prosperity of the farming community is that it results in requiring the farmer to pay double taxes to a great extent. He is required to pay taxes upon the assessed value of his farm and personalty without any deduction for his indebtedness. His farm is assessed substantially its full value although he may be indebted on it for from one-half to two-thirds its assessed value; his personalty is likewise assessed although he may owe on it substantially the whole purchase price.

BANEFUL EFFECT OF INEQUALITIES.

The result of these defects in the present system of assessing property is that the farmer and the resident of the villages and small cities are generally assessed for substantially all their personal property at about its real cash value, and their real estate is also assessed at nearer the cash value than in the larger cities. As to real estate assessments, however, it may be said that as a rule they average higher in the villages and small cities than do the assessments of farm real estate. The reason for this may generally be traced

to the fact that most villages and small cities of late years have decreased in population and in industrial prosperity, causing a decrease in the value of real estate therein, without a corresponding reduction in the assessed value. The result is that the farmers and the residents of the smaller municipalities pay a much larger general tax accordingly than do the owners of property in the larger cities. -

While this discrimination in favour of the owner of property, especially personal property, in the city, is generally conceded, it is, however, claimed that the matter is not of great importance, since it only affects the taxes raised for state purposes and that local municipal taxes are not affected thereby. This contention is, however, fallacious, as it fails to take into consideration the fact that, since personal property is more generally assessed in small municipalities than in the large cities, the result is oppressive to industries in the small municipalities, which have to compete with similar industries in large cities which are favoured in taxation. This works against the industries in the rural sections not only because they are required to pay a tax of in the neighbourhood of 3 per cent. on both their real estate and personal property at an assessed value of nearly, if not equal to, the actual value, while in the larger city industries will be taxed only a small portion of the actual cash value of their real estate and personal property; but such industries are also discouraged in the smaller municipalities by the fact that the assessment of other personal property, including money and choses in action, has the effect of inducing the residents of these places who are thus subjected to a large tax, frequently amounting to from one-third to one-half the income of their property, to take up their abode in the larger cities, where practically no attempt is made to tax them on this class of property. In this manner much of the capital which otherwise would stay in the smaller municipalities is driven to the larger cities; hence the owner of an industry located in a small municipality finds it hard, if not impossible, to borrow the money over and above his capital, necessary successfully to carry on the business in which he is engaged. To borrow this money, the owner of the industry finds it necessary also to remove to the large city.

The result is a constant loss, both of people and money, by the country, villages and smaller cities to the larger

cities. The story of this constant flow of population toward the great cities is best stated in the census returns, and while perhaps this discrimination in taxation is not entirely to blame for this condition, it is largely at fault for it. Competition in most industries is so fierce as to make the amount of the assessment and the rate of taxes, as well as the ability easily to borrow money necessary to operate a large manufacturing business, decisive tests in determining the location of the business. Hence to these inequalities in the practical working of the present system of taxation may in a great measure be charged the lack of prosperity in the villages and smaller cities that now generally prevails. And to this system of taxation may be ascribed the failure of the farming districts to shew any decided advance in population during the last decade, as well as the actual loss of population in many localities during this period.

REMEDY.

Inasmuch as the movement from the rural districts to the large cities is very generally deplored, and serious efforts are being made to check same, the effect of our present system of taxation on this movement cannot be overestimated. It should lead to serious inquiry as to whether or not a more equitable means for raising the public revenues cannot be adopted,—one which will do away with the present system of requiring the owner of farm lands to pay taxes on the entire value of his land and personal property, regardless of his indebtedness thereon; and also a system that will be less repressive of manufacturing industries in the smaller cities and villages, that will not tax the small capitalist on his credits or money, thereby inducing him to remove to the larger city, where he enhances the opportunity to escape such taxation.

THE INHERITANCE TAX.

Different remedies for these generally acknowledged defects in the present tax system have been proposed, and one of them to a limited extent is now in force in many jurisdictions; this is the taxation of the right of succession, commonly called the inheritance tax. This tax is subject to the criticism that it is a double tax, and also that the amount each year to be derived from that source of revenue is un-

certain. These objections or criticisms are, however, of small weight as compared with the advantages of the system, and especially the good to be derived from the system if developed along the line of a tax highly progressive in accordance with the size of the estate by thereby causing a frequent distribution of wealth and a dissolution to a great extent of large estates. In this way such a proportion of the needed revenues may be raised as will give immediate and substantial relief from the present system, to those most in need of it. And, as stated, this form of taxation also has the virtue of providing a means for the compulsory distribution of large estates. For these purposes it has been used in France with very gratifying results, where the maximum rate on distant collateral inheritance of succession to the largest estates is now 34 per cent., a rate which might be regarded as confiscatory were it not for the fact that neither in this country, nor in few if any other civilized countries, is the right of inheritance deemed to be a vested property right. Since without laws of descent and distribution, property upon the death of the owner would escheat to the state or the sovereign power, hence in conferring the right of inheritance upon any individual or class of individuals, the state may place such burdens and limitations thereon as the public welfare may require. The taxation in this country of estates of decedents, if based on the theory of the French tax, would go far toward providing all the necessary revenues needed for public purposes if the Government were economically administered.

DIRECT TAX ON REAL AND PERSONAL PROPERTY.

In addition to the foregoing method of raising revenue, the present method of taxing real estate and personal property may be rendered more equitable and less repressive of farming, and industrial business in villages and the smaller cities, by raising all the taxes through action of the state, rather than the different municipal bodies. All property, both real and personal, should be assessed by state assessors, and the actual cash value of the property should be determined by the condition and situation of the property and its selling value, estimated with due regard to the actual or probable income therefrom. The gross income to be con-

sidered unless the owner, under oath, shews that he is entitled to deductions therefrom for money expended in operating expenses or ordinary repairs, etc. This means of assessing property should be applied both to real and personal property, and should include common carriers, telephone and telegraph lines and other public service corporations, and the value of their franchise. The owner of property taxed should be entitled to have deducted from the cash value his bona fide indebtedness thereon. This deduction, however, should depend upon the interest rate. If the interest rate is a low rate, say 4 or 5 per cent., the owner of the property should be required to pay taxes on the full cash value. If a higher rate of interest is exacted he should only be required to pay on his actual interest in the property; the balance of interest in the property should be assessed to the creditor at the same place as the local assessment, without reference to the actual residence of the latter. And payment thereof should be enforced by laws forbidding the right to proceed in the Courts to enforce any debt or lien on which the taxes have not been paid.

The taxes paid by public service corporations should be so assessed as to cover their just proportion of the state taxes and the taxes of the smaller governmental agencies, such as counties, towns, cities and villages which may be traversed by such public service corporation. Since they receive the benefit of fire, police protection, and other benefits from these municipalities, it is but right that they should contribute to the expense. The taxes paid by these different corporations should be distributed among the different municipalities traversed by them, and should be based upon a rate per cent. which the mileage, value of improvements, etc., in each municipality bears to the assessed value of the entire property, which of course would include the value of the franchise.

THE INCOME TAX.

Aside from the inheritance tax and comprising practically the other modes of taxation already proposed, is the income tax in a modified and more practicable form than the ordinary income tax. Because under the proposed system of taxation either the specific property or the income therefrom, unproductive real and personal property are

taxed as also are productive real and personal property, but in the latter case the tax is a single tax in that the owner, if he is assessed upon his income, including the income from such property, is entitled to have the direct tax deducted from the amount of his income tax, and this tax is on the gross income less operating expenses proven under oath. The result is a tax in so far as practicable on the net income only, but on a basis which will prevent fraud in escaping taxation, and insure the taxation of all property either by taxing the income or the property itself.

The income tax as a means for raising the revenue may also be commended in that it is the least oppressive of any, unless it is the inheritance tax. There are to-day thousands of our people who enjoy large incomes, who send their children to the public schools without expense, and who otherwise receive all the benefits of taxpaying citizens, but who share in none of the burdens of government and hence feel little of the responsibilities of citizenship. The wise and economical use of the funds raised by taxation is of little interest to this class of people as a general rule, and to this may be laid the fact that extravagance and waste in the management of public affairs may be continued with but little danger of rebuke at the polls.

It is frequently claimed that inasmuch as these people are consumers they indirectly pay a tax. This is to a great extent a fallacious theory, however, since the price to the consumer as to most articles, including rent, is influenced too largely by extrinsic facts, such as competition, supply and demand, etc., to make it possible for the taxpayer to compute and add to the selling price or rental, the amount of taxes paid. Moreover this form of taxation on the consumer, if it be regarded as a tax, falls equally upon all consumers, the direct as well as the indirect taxpayer.

In order, therefore, that the burdens of government fall more equally upon all citizens, the income of all persons, natural and artificial, above a minimum amount, say \$500, should be taxed for state and municipal purposes according to the residence of the individual; but as already stated the direct taxpayer should be entitled to have deducted from his income tax the amount of his direct taxes on the property from which any part of the income is derived.

CONCERTED STATE ACTION.

In order that any system of taxation be entirely successful, concert of action by the different states in the manner of raising same and the rate per cent. is imperative. In this manner all competing industries in the different states in the matter of taxation are placed on a substantially equal basis, and no state will become an asylum for tax dodgers.

MAXIMUM RATE.

Not only should taxes of all governmental agencies be raised through concerted state action, but in the same manner a maximum rate should be fixed by the different states, covering taxes of every character, except local improvements, which may be lawfully assessed in any one year. This maximum rate should be high enough to meet the absolute necessities, but at the same time low enough to make it necessary to practise strict economy in state and municipal government. In order, however, to take care of special cases where a greater amount than this maximum rate is both desired and desirable, any municipality should have the power, by a direct vote of the people, to increase this maximum rate; this vote to be based upon a budget to be prepared by the proper municipal officers, which of course should be submitted to the voter prior to his vote.

CONCLUSION.

While there are many evils to be overcome in our governmental affairs, this question of taxation is one of the most important ones. The suggestions herewith submitted as a means to overcome this particular evil are more in the nature of an outline than an attempt to take up in detail the different methods of raising the revenue suggested, which of course would be impracticable in an article of this character.

MODERNIZATION OF MARRIAGE AND DIVORCE.

It will be contended this is a strange subject for treatment by a law writer. It, however, is the basis of the home life of posterity, the foundation upon which both domestic and state government will rest. What, then, can be more important as it concerns the complete realization of life in its most beautiful aspects. We maintain that free divorce stands for the complete modernization of the marriage contract. A eugenic conscience must take the place of the old theological views. The conspiracy of silence between parent and child as to sex relations must be broken. Progressive and enlightened communities will in the light of intelligence upset our deepest rooted prejudices and invoke laws governing, bringing the like, both physical, mental and emotional, into a harmonious merger,—a perfect whole.

The tyranny of the Golden Calf is of little weight when compared with the outrageous exaction imposed under the name of matrimonial rights. Marriage through love and sense alone will re-establish the life of the family as the great future vocation of men and women. Two great factors influence the lives of all humanity, heredity and environment.

The perfect child must be the creature of perfect conditions. New civilization has brought in its train a demand for science in conjunction with faith. The narrow horizon of yesterday must broaden in the bright light of to-morrow. Pride in past achievements must not cause a deaf ear to the warnings of the laws of reason and affection. The supreme mission of marriage and of eugenics is to stop the process of degeneration and find a new science, which, when applied, will act favourably on the racial qualities of future generations. We must not blind ourselves to the danger of interfering with nature's ways.

The inquiry is made, in what respect should the marriage laws be changed or altered? It is not so much in the laws themselves that a change is highly desired as in the union of souls and beings. To the writer's mind regulations are of little value unless backed up by education and intelligence. Like will beget like, one harmonious atom will seek one of its own spiritual affinity whenever space admits. Oil and water will not mix, so, too, natures totally unlike

and unaffined cannot live a properly attuned life. There must be a mental and a physical union,—the planes must be evenly adjusted. The mould of love may differ with the individual in kind and degree, but it must suit and find its kindred mate, else no music in the union.

Try as we may, these facts can not be successfully questioned. The enforcement of marital rights is at best legalized prostitution.

Mistakes are bound to be made in marriage. We must have distracted heads and broken hearts or an open door to separation and divorce. Free divorce based on the one cause of "incompatibility" will bring back the marriage relation to its eternally binding realities. The love of men and women and their children will be the binding force, holding families together in permanent trust and open honesty.

In the midst of present dissatisfaction and unrest, and the revolutionizing of our deepest conception of life, the family must change—must find its ethical and social readjustments. It is not the militant agitator, but the idle parasitic wife, whom those who uphold the finest family ideals of the past should fear; not any subversive philosophy, but over-work and the desire for luxury; not freedom, but unthinking acquiescence in antiquated marriage laws. The monogamic and persistent union of lovers, surrounded by their children, will easily survive all the mistakes of a time of transition.

Could we but look ahead for half a century who then will understand how church and state could have licensed and consummated marriages between young and inexperienced people, marriages which were to be binding on their thought, feeling and action for life, without requiring some time, however brief, between the application for a license and the final binding vows? Who will be able to understand how church and state could have sanctioned marriage between a broken-down old man and a young and inexperienced girl of seventeen? How will the future student explain the fact that in New Jersey, state and church combined to sanction and bless the marriage of an imbecile woman and of her offspring until they had produced 143 feeble-minded children to curse the state? Who will then believe that in the year 1912 an English citizen could go before a Court and secure an order for legalized rape, under the name of restitution of marital rights?

Meantime every issue of the daily press counts as its choicest items stories of the shameful and soul-destroying ways in which men and women are trying to live their lives in spite of this medieval institution. So far-reaching is the unrest, that at each new revelation of marital heresy, society feels constrained to rush forward and frantically denounce the heretic in order to prove its own orthodoxy.

The first objection to easy and free divorce is that organised society rests on the family, and with free divorce anarchy would ensue. In reply, it is pointed out that the same argument was used to support kings, aristocracies and a universal church. All these have been set aside, in many parts of the earth, and society seems even more stable than before. The love of men and women is probably more powerful and less in need of adventitious support than either patriotism or religion.

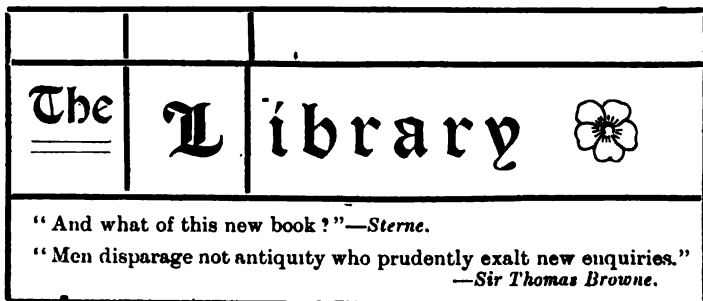
It must be borne in mind that the human family is even more diversified and unlike than the animal kingdom. We are either fickle by nature or constant. There is the man whose loves are as numerous as the dollars in his pocket-book, or the hours in his day. There is the woman whose affection is distributed as lavishly as her date book will allow. There is the chap who loves the blonde as long as the brunette is not "nigh." There is the girl whose loves endure as the foam of the sea. There is the love that is nourished as a hothouse plant, and blooms just as long as it is cherished, fanned and fed. There is the love which starves to death, when the gardener loses his fortune, and the rose its perfume or its color. There is the love that is righteous, consuming, while the flame of passion burns, but which is extinguished with the cool breath of "the morning after." And so on, there are lovers and loves, infinite in their diversity and illuminating in their development. All these loves can be cultivated, and at the same time can be killed at will of either party to the contract, or understanding, as the case may be.

In sex relations, in brain equality, there comes to human life a craving, an insistent demand for a sane and reasonable love. If found and attached it brings a union which is more than mortal. No man knows what it is, save that it seems an instinctive feeling. No true woman may honestly resist its call, nor disobey its command. It simply is. It always will be when it finds its perfect mating. This

is the love of which was written, "True love will stand the test of time. Poverty cannot shake it; money cannot buy it; enemies cannot kill it; old age cannot wither it; the rich cannot monopolize it." This is the love whose disciple "can muse in a crowd all day on the absent face that fixed him"—no matter how many "fairies" are beckoning to him in that crowd. It is the love that transfigures the homely little housewife into a dream princess, the love that makes a commonplace man or woman into a splendid, truthful, loyal being. It is usually a calm love, a quiet love, but it never flickers, falters or flitters. It is fixed, steady, deathless. It shrinks from publicity or demonstrations, just as the real, the genuine always evades the limelight. It has "no axe to grind," it seeks neither justification or commendation. It is sufficient unto itself and resents intrusion.

To be one of this union, is to enjoy to the fullest the benediction of the God of Nature to the human race. All else is death in life. It stands for the complete modernization of marriage.

The Lawyer and Banker.



Statute Law Making in the United States. By Chester Lloyd Jones, Associate Professor of Political Science in the University of Wisconsin. Boston: The Boston Book Co.; Toronto: The Carswell Co. Price, \$2.75.

The contents of this splendid book are concisely set forth by its title, and the author in the preface, a portion of which is here quoted, sets forth the object of the work. "Bills are introduced in such numbers that it is impossible for them to receive adequate consideration. They are often drafted by men who have not made any attempt to see the

proposed measures in the perspective of the general law of the state. As a consequence we have a mass of ill-considered statutes which, by their indefiniteness and failure to observe constitutional limitations, throw upon the Courts a burden of interpretation which forces them frequently to resort to judicial legislation, and to declare the statutes void. Popular prejudice is aroused against the Judges who, because laws well-intentioned, but poorly drawn are declared void, are charged with being an obstruction to needed social advance. The blame which should fall upon the careless draftsman of the law, too often is shifted to the Court. But even if the bill stand the test of constitutionality, if it is not well drawn, it fails to accomplish its purpose. American legislation furnishes examples without number of laws, which are weak, or altogether powerless. Those who draft the statutes are prone to forget that a declaratory law is usually a nullity, and if any rule is to be enforced, adequate administrative machinery must be provided. The object of this book is to outline the means by which these defects may be avoided."

Under "Limitations of Legislative Action," a discussion of which occupies the first part of the book, a cause for the looseness in the drafting of the various statutes is set out, and under the heading "The Use of Experts in Legislation" the following comparison between the methods of the English Government and that of the United States, is interesting.

"The English government furnishes the best example of the adjustment of the relations of expert service, and democratic control. Those who settle what shall be done, draw their authority from popular election, and act through a committee, a cabinet, which is at all times responsible to the legislature. If "the government" changes, little over thirty administrative positions become automatically vacant. Those who carry out the policy determined upon are in permanent government employ. The people at the elections approve or disapprove the *policy* of their temporary servants. These servants exercise control over the policy of administration, but do not interfere with the rank and file of permanent public service. A similar division is found in the formal making of the laws. Control over the content of bills is left in the hands of the legislature, control over the form is delegated to a separate set of officers, who by long training

have become expert in setting forth in clear language, the legislative purpose proposed for adoption.

The advantage of these arrangements is evident. By removing questions of patronage, and relieving the legislator of the necessity of making the language of statutes correspond with the intent, the efforts of the legislature can be devoted to decisions on policy. Ministerial duties are reduced to a minor position, and discretionary powers are given their proper importance. Debate on public policy takes the place of debate on the formal details of phraseology in the law.

America has been slow to adopt similar expedients. The power of patronage in our Federal government was long a corrupting influence in our party politics, and a disturbing factor in legislation. The Federal civil service law of 1883, with its subsequent modifications, has removed the greater number of the public servants from active participation in politics, but Federal offices are still an influence in politics, and it often seems that the cutting down of the places for distribution has only sharpened the controversy in the legislature over the control of those remaining. In many of the states a non-partisan civil service is still a distant ideal, and in no case has a standard satisfactory to those anxious for efficient government been attained."

Under the heading "Titles of Bills" appears a further comparison of the practice in England, and the United States. "American practice has developed far from this standard. In no case is the contrast stronger than in the rules in England and America, relating to the titles of bills. Custom and law in England, have made bills there conform to the same standard striven for in America—in fact the English practice of employing a special parliamentary officer to have charge of the form of all bills, has given an effective guarantee that the rules, including those as to title, will be observed. But there the safeguard of the form of bills is always custom or statute law not binding on the legislature. In America the form of bills has not only been regulated by custom and statute, but has also been crystallized into most of our constitutions." After this follows a detailed discussion of the various portions of an Act of Parliament, including the preamble, enacting laws, subject matter, language, repeals, the clause taking effect, and amendments.

Under Legislative Expedients, the form of bills, penalties, &c., are discussed. The work, altogether, is an able one, and is of prime importance at the present time in Canada, for to a very great extent the evils existent in the United States, are equally prevalent in Canada, as is evidenced by certain clauses of the Railway Act, which were found by the Privy Council, in the case of the *Municipality of the Town of North Toronto v. Niagara Power Company*, not to carry into effect an intention of the Dominion parliament, which amended the Railway Act for that express purpose.

"The Canadian Torrens System." By Douglas Thom, B.A., of Osgoode Hall, barrister-at-law, and of the Bar of Saskatchewan. Burroughs & Co., Limited, Calgary.

This publication fills a long felt want in the legal lore of Canada. Until its publication, there was no authority which could be consulted on the Torrens System, or as it is more generally known in Ontario, "Land Titles." In addition to describing the ordinary workings of the system, there is a chapter on the assurance fund setting forth to what extent the fund is liable for loss by mistake or otherwise, and in what measure it guarantees the owner of land placed under this system of registration. This work will save the conveyancer much trouble and annoyance by giving him a thorough knowledge of the requisites of the Torrens System, besides which the forms, statutes, and cases cited should ensure the book a place in every solicitor's library. It may be stated that this is the first publication of a law book in the province of Alberta, and the publishers as well as the author are to be congratulated on the success of the work.

The Law of Landlord and Tenant. By Joseph Haworth Redman. Butterworth & Co., London, Eng., and Winnipeg, Man., Canada.

This standard work now enters upon its sixth edition. It has been thoroughly revised, and some parts re-written, the new matter dealing with those sections of the subject which have been found to be of practical use to the profession although only met with occasionally. The arrangement is that followed in the previous editions which the experience

gained by constant reference has proved to be most convenient. The changes made in the law, whether by statute or by judicial decision, have been embodied in the present edition.

The book covers the entire field of this most intricate and often troublesome subject.

Under the heading of "Leases" a clear and practical definition of a lease is given, its essentials, and the distinction between lease and license explained.

The law as set out in this work in relation to flats is most complete and will be found of inestimable value to the conveyancer at the present time, when the erection of apartment houses is so greatly on the increase. This is well exemplified by the clear manner in which the rights involved under the covenant of quiet enjoyment is explained.

The law of fixtures, distress, forfeiture, and relief against forfeiture, as modified by recent decisions, is explained and a comparison made with the law as previously existing.

The subjects of mines and mining leases are also exhaustively dealt with.

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THE KING v. THE ROYAL BANK.

The decision of the Privy Council appears to indicate that a provincial statute which deals with a subject within the jurisdiction of the Legislature, but which has, as one of its effects, a prejudicial operation upon a right of action existing outside the province, is *ultra vires*. That is a new and a very disturbing idea. May I take the liberty of respectfully doubting its validity?

The facts of the case, so far as they are necessary for comprehension of the reasons given for the judgment, can be briefly stated. The Province of Alberta incorporated a railway company; made an agreement with it for construction of its road; and guaranteed its bonds. The bonds were sold in England. The proceeds were to be deposited in the Edmonton branch of the Royal Bank (head office in Montreal) to the credit of the Provincial Treasurer. No specie was actually sent to the branch. Probably no specie was handled by anybody in connection with the transaction. The bank, through its head office officials, obtained the credit from Morgan & Co. in New York, and, at the same time that the Province handed over the bonds it received a memorandum in which the bank assured the government that the money was on that day "to the credit of the Province of Alberta—Alberta and Great Waterways Railway special account—in the Royal Bank of Canada, Edmonton." As between the bondholders, the bank and the Province, therefore, the money was within the jurisdiction of the Legislature of the Province. It was to be paid out as the work of construction proceeded.

The work commenced but had not got very far when the Province passed a statute which, after reciting that the company had made default in its work, and in the pay-

ment of interest on its bonds, (1) directed the bank to pay over the money to the government, and (2) assumed direct, instead of indirect, liability for the bonds. It said nothing about the work or the company's relation to it.

The Privy Council held that this legislation was *ultra vires*. Their Lordships said:—

“It appears to their Lordships that the special account was opened solely for the purposes of the scheme and that when the action of the government in 1910 altered its conditions, the lenders in London were entitled to claim, from the bank at its head office in Montreal, the money which they had advanced solely for a purpose which had ceased to exist. Their right was a civil right outside the Province and the legislature of the Province could not legislate validly in derogation of that right.”

“In the opinion of their Lordships, the effect of the statute of 1910, if validly enacted, would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders, whose right to this return was a civil right which had arisen, and remained enforceable, outside the Province. The statute was on this ground beyond the powers of the legislature of Alberta, inasmuch as what was sought to be enacted was neither confined to property and civil rights within the Province nor directed solely to matters of merely local or private nature within it.”

Argument had been made on behalf of the bank that, inasmuch as the proceeds of the bonds were not transmitted to Edmonton in actual specie, there was no property in Alberta with which the legislature could deal; but their Lordships intimate no opinion as to the validity of the argument. They probably thought it immaterial, for, in any case, there was a civil right of the government and the railway, in respect of the liability of the bank, within the Province. The decision proceeds upon the ground that the Province had no power to deal with “property and civil rights within the Province” in such a way as to affect a civil right outside the Province.

In relief of the counsel who represented the Province before the Judicial Committee, and who possibly might be thought to have overlooked what (I respectfully believe) are the obvious answers to the view of their Lordships, it is only fair to say that none of the bank's advisers either in Canada or England had imagined that there could be any

validity in the point decided; that it was not referred to in the pleadings; that it was not mentioned in either of the two arguments in Canada; that it was not suggested in the opening speeches of the bank's counsel in London; that it was never hinted at by anybody until leading counsel for the Province had delivered two-thirds of his address; that it was then put forward, not by the bank but by Lord Macnaghten; and that counsel for the Province, without a moment for reflection, had to deal with it as best he could. His answer was that if the Province could deal with the subject-matter of the money—either as property or as a civil right—its jurisdiction would not be ousted because of an effect produced outside of the Province. That I believe to be sound, but it was merely negating the contrary suggestion. The point was not further argued; and there is nothing in the reasons for judgment read by the Lord Chancellor that tends to indicate that their Lordships had considered, or even thought of the various points which, to my mind, make their conclusion impossible of acceptance.

In the first place, there was neither pleading nor proof of the facts which are now alleged as subversive of the jurisdiction of the Province. The bank had pleaded that the statute was *ultra vires*, and could therefore have raised any objection which appeared upon its face. But, if the bank, in support of its assertion, relied upon the existence of certain extraneous facts, it ought to have pleaded and proved them. The alleged right of the bondholders might or might not have existed. It would not necessarily result from the mere fact that the legislature had changed the place in which the money was, and their Lordships do not say that it would. They hold that the money was raised "for the purposes of the scheme, and that when the action of the Government in 1910 altered its conditions, the lenders in London were entitled to claim from the bank, at its head office in Montreal, the money which they had advanced solely for a purpose which had ceased to exist." And they say that the removal of the money from the bank to the Province "would have been to preclude the bank from fulfilling its legal obligation to return their money to the bondholders."

But what was the alteration in the scheme? There is no sign of it in the statute. There is no trace of it in the evidence. There is no suggestion of it in the pleadings.

Their Lordships attribute it to the "Government." What did the Government do? As far as we can see, the Government did nothing and had no power to do anything. Even if there had been some alteration, the necessary result would not be the creation of a right in the bondholders to return their money. We should have to ascertain very carefully, what the alteration was; whether it affected prejudicially the position of the bondholders;¹ the circumstances under which the bondholders advanced their money; how far the work of construction had proceeded; whether the bondholders had in any way (by accepting interest from the Government, or otherwise) precluded themselves from bringing an action for the return of the money, and so on. In short, the bank should have pleaded all the facts necessary to shew the existence of the bondholders' cause of action; the Government would then have pleaded such facts as were thought to be material in deference; and at the trial, the question for decision would have been the one question that, at the trial, nobody mentioned, and nobody imagined to be of the slightest importance.

Perhaps this point is of little constitutional importance—unless, indeed as a ground for consideration of the advisability of continuing the practice of settling our law-suits outside of Canada; and unless as a ground upon which the compliment that their Lordships were good enough to pay to the Canadian Judges may fairly be returned: "Elaborately as the case was argued in the judgments of the learned Judges in the Courts below, their Lordships are not satisfied that what appears to them to be the fundamental question at issue has been adequately considered."²

First Point: As preliminary to discussion of the decision, let us ask whether several statutes passed by the Manitoba Legislature, re-arranging the financial affairs of municipalities—reducing or postponing or otherwise dealing with their bonded obligations, are or are not *intra vires*? The bonds were sold outside the province, and their holders

¹ During the argument it was stated to their Lordships that the bonds had a higher market value after the statute than before.

² The case upon which their Lordships proceeded (*National Bolivian &c. v. Wilson*, 5 App. Cas. 176) is easily distinguishable, for, there, the bondholders' money was in the hands of "trustees for the bondholders." It had never been paid over! Counsel for the Province had little time to unravel the intricate facts of that case, and no attempt was made to argue its effect.

resided outside. Was the legislation, for that reason, *ultra vires*?

Remember, too, the case of *L'Union St. Jacques v. Belile*, L. R. 6 P. C. 31, in which the Quebec legislature undertook to relieve the Union from embarrassment by altering the rights of its members. The Privy Council held the statute good. But suppose that one of the members had lived in Ontario?

We shall all agree that the jurisdiction of the provincial legislatures in those two cases would be unaffected by the extra-territorial residence of some of the parties whose interests had been dealt with by the legislation. It may be urged, however, that, in each of the cases, the civil right was not one which existed wholly outside the jurisdiction, because the corporation, against whom the right existed, was within the jurisdiction and could be sued there only. But that, for three reasons, is not a valid distinction: (1) A right is quite distinguishable from the method or place of the enforcement of the right. (2) The right against the municipality and the Union might be enforced in jurisdictions outside the provincial limits, if they had at any time any assets there. (3) It is immaterial whether the action is brought within the province or elsewhere, for if the legislation is invalid, it will be respected in one place as little as in the other.

The conclusion then that provincial legislation, otherwise competent, is rendered invalid merely because it incidentally affects the right of somebody outside the jurisdiction to bring an action against somebody else, seems not to be well founded.

Second Point: The case for the Province can be put, more clearly and effectively, than by basing its validity upon the two sub-sections of the B. N. A. Act to which, alone, their Lordships refer, namely, "13. Property and civil rights in the Province. 16. Generally all matters of a merely local or private nature in the Province." Argument thus based appears to be open (but really is not), to the answer that Alberta can deal with a civil right, or a local matter in the Province but not with one outside; and that that is what Alberta, in effect, did. Leave that aside for a moment, and transfer the argument to another sub-section: "10. Local works and undertakings;" and ask whether the legislature had not complete control

over the railway company which it had created; and whether it could not have legislated as it pleased, with reference to every asset which the company had in the Province, even if in so doing it swept away liabilities, liens, bondholders' claims, or any other civil right in Alberta or China.

In the case of the Manitoba municipalities, observe that it was not because of control over "civil rights within the Province" that the authority to borrow was given to them. It was because of power over "municipal institutions in the Province." And it was by virtue of the same power that the Manitoba Legislature dealt with the assets and liabilities. All their properties, assets and liabilities, depend, in the last analysis, upon the authority given to them by the legislature, and nothing that may happen to them can put them, or their interests, beyond the control of the same authority.

In the same way, Alberta created the railway company and enabled it to borrow the money in question, not at all because of provincial control of "property and civil rights," but because of its jurisdiction over "local works and undertakings." And it is by virtue of the same authority that it can do as it pleases with the company and all its assets within the Province.

Look at the matter in another way: Their Lordships hold that the statute was bad because of its effect upon a civil right outside the Province. Yet their Lordships agree that Alberta could have repealed all its legislation—could have cancelled the charter of the company, and could, thus, have deprived every bondholder (irrespective of his residence) of his civil right to sue the company anywhere. But what authority, for so doing, has a local Legislature? Clearly the sub-section "property and civil rights in the province" has no bearing upon the subject. Fix attention upon that clause (as their Lordships do), and the conclusion necessarily is that the legislation was without authority—for the civil right with which they were dealing, is without the Province. Base your argument upon "local works and undertakings" and the result is, just as clearly, the contrary. If, under that heading all the rights of the bondholders, everywhere, to *enforce* their purchased bonds can be absolutely cancelled and destroyed, how can it be said that, acting under the same head of jurisdiction, the

Legislature cannot deal with the railway and its assets in Alberta in such a way as will, incidentally, deprive the bondholders of a right, anywhere, to *cancel* their purchase? Fix attention upon the railway and its assets in Alberta, and ask whether, in legislating with regard to them, the province is limited by considerations of the effect of its statute upon the legal relations of everybody outside Alberta to everybody else?

Third Point: It is said that a Provincial Legislature cannot, when legislating solely with reference to property within the Province, indirectly—or rather consequentially—annihilate a civil right outside the Province. Try the converse case. Can a Provincial Legislature *create* a civil right outside its jurisdiction? That would seem to be more difficult, and clearly it could not be done under the heading of “property and civil rights in the province.” But is a Provincial Legislature so limited that its legislation (otherwise competent), is invalid if *one of its effects is to create* a civil right outside the province? Very clearly—no. For example, the Judicial Committee held in *Attorney-General v. Attorney-General*, 1894, A. C. 189, that an Ontario statute, which gave to a general assignment for the benefit of creditors, precedence over existing judgments and executions, was *intra vires*. Now suppose that one of the judgment creditors had resided in England; that previous to the passage of the statute he had transferred his judgment to trustees and had covenanted that it was, *and would remain until payment*, a first lien and charge upon all the debtor’s estate in Ontario—would the fact of the existence of the London judgment, of its transfer, and of the accompanying covenant have rendered the statute invalid? Certainly not, and yet the effect of the legislation would have been to *create* a civil right in London—to give a cause of action, for breach of covenant, to one Englishman there against another.

I need not, however, imagine a case. The circumstances of the one in hand shew (if their Lordships are right), that competent provincial legislation may, as one of its indirect effects, create a civil right outside the province. For their Lordships expressly say that the effect of alteration of the scheme by “the Government” in Alberta, gave to bondholders in England a claim against the bank in Montreal. Now, if the Government in Alberta could constitutionally

alter a project in Alberta, although one of the effects of the alteration was to create a civil right in Montreal, how can it be argued that the Alberta Legislature is constitutionally prohibited from legislating with reference to a provincial railway, or with reference to "property and civil rights," by considerations of incidental effects in Montreal?

Fourth Point: The Judicial Committee has held, on several occasions, that the B. N. A. Act, "makes an elaborate distribution of the *whole field* of legislative authority between two legislative bodies."² During the argument of the case under consideration, the Lord Chancellor vigorously upheld that doctrine, and declined to agree that there was any subject of legislation reserved for the action of the British Parliament.

Very well, now, the bank's head office was in Montreal, and suppose that the bondholders (instead of living in England), resided there too—under these circumstances the Alberta statute (according to the decision) would be *ultra vires*, and is it said that the Dominion Parliament, for that reason, could have enacted it? Or that the two legislatures together could have done so? By no process of argumentation can any jurisdiction in the matter be placed in the Dominion Parliament. If that be true, and if all legislative authority over affairs in Canada is rested in some legislature or legislatures here, how can the claim of Alberta be disputed?

If the Manitoba Legislature could not re-arrange the liabilities of one of its municipalities because a creditor lived in Toronto, is it contended that, for that reason, the Dominion Parliament could pass the necessary legislation?

Fifth Point: Not only in the present case, but in several others, far too much importance has been attached, in considering the schedule of provincial powers, to the frequently recurring words "in the province"; for it is not too much to say that if those words had been omitted, the effect would have been precisely the same as it now is. For example, if instead of "municipal institutions in the province," we had the words "municipal institutions"—without more—no one would argue that any province had jurisdiction over municipal institutions *outside* its boundaries. In the same way, the omission of the last three words in the

² *Bank of Toronto v. Lambe*, 12 A. C., p. 587-8. And see *Union Colliery Co. v. Bryden*, 1899, A. C. 584-5.

sentence "the solemnization of marriage in the province" would not have raised any doubt as to the jurisdiction of one province over the solemnization of marriage in other provinces. For similar reasons, the sub-section, "property and civil rights in the province," might just as well read "property and civil rights"; for no one would imagine that the intention of the draftsmen was to give to a provincial legislature that which no parliament in the world has, namely, legislative power beyond its geographical area. An idea seems to pervade the profession that the colonial inability to pass extra-territorial laws does not attach to completely sovereign states; but a moment's reflection will convince anybody that a French (or any other) parliament has no more authority over municipal institutions outside French jurisdiction than Ontario has. That doctrine of extra-territoriality is very much misunderstood.

For example, the French parliament can deal as it pleases with the property and assets of any of its railways, so far as such property and assets are within the territory subject to its authority. It can do no more. Alberta has exactly the same power. The jurisdiction of its legislature is certainly limited by its territorial extent, but in that respect it is not, in the least, different from every legislature in the world.⁴ The words "in the province" express only that which is implicit in every constitution.

Sixth Point: Suppose that the present case had arisen in France; that the railway company was there, and the money in a branch of an English bank there; but the bondholders (with a right, such as here alleged, against the head office of the bank in England), resided in England—in that case would the legislation be *ultra vires* of the French Parliament?

Perhaps you ask, how could such a question arise? Quite easily—by the bondholders in England suing the head office of the Bank of England, and the bank attempting to defend itself on the ground of the French legislation. That is one answer; but a better one is that the question is *intra* or *ultra vires*, and not how, or whether at all, the jurisdiction may be brought to the test. The question is one of sovereign power. Has or has not the French parliament authority to deal with property and civil rights within France, if one

⁴ Subject to any power, in this respect, of the Dominion parliament.

of the effects of its statute would be to disturb the legal relations of two persons residing in England. Is the legislative authority of the French parliament over French railway companies and their assets limited by considerations of the effect of its legislation in England? No one would think so. Why then is Alberta's powers circumscribed in that way? Because she has authority over property and civil rights only when they are "in the province?" No, for French power is similarly limited. Then, why?

Seventh Point: Their Lordships hold that because of the alteration in "the scheme" the bondholders had a right to elect to rescind their purchase and ask, in Montreal, for the return of their money. They might not (and almost certainly would not) so elect; but they had a civil right to elect, and therefore legislation transferring the money from the bank to the province was *ultra vires*. Very well, now suppose that a man in Ontario was defrauded, by a person resident there, into the sale of a horse; that the purchaser sent the horse to Alberta; that an Alberta statute provided that sales of horses in market overt should pass a good title; and that the horse was so sold—would that statute be *ultra vires* because its effect would have been to destroy the civil right of the Ontario man to elect to rescind the sale? The "case of a horse" is sometimes very illuminative. What is the difference between it and the present case?

Eighth Point: Distinguish between, on the one hand, legislation dealing with a subject over which Alberta has jurisdiction, which produces an effect outside the province, and (2), on the other hand, legislation assuming, directly, to produce that effect. The British Parliament may do the one, but is powerless to do the other.

A British statute, declaring that a British subject could not be sued in France, would be a poor defence in a Parisian court. But a British statute changing the law of inheritance of English property would be valid, although it disturbed legal relations all over the world. That the same distinction applies to our provinces, may be supported not only by reason, but by the decision of the Judicial Committee in *Attorney-General of Manitoba v. Manitoba License Holders' Association*, 1902, A. C. 73. Holding that the Manitoba Liquor Act intended to suppress the liquor traffic (in the province), was valid, their Lordships had to

defend it against the argument that it affected interests outside the province. That was not difficult:

"It is not necessary to go through the provisions of the Act. It is enough to say that they are extremely stringent—more stringent probably than anything that is to be found in any legislation of a similar kind. Unless the Act becomes a dead letter, it must interfere with the revenue of the Dominion, with licensed trades in the Province of Manitoba, and *indirectly at least with business operations beyond the limits of the province*. That seems clear. And that was substantially the ground on which the Court of King's Bench declared the Act unconstitutional. But all objections on that score are in their Lordships' opinion, removed by the judgment of this Board in the case of *Attorney-General for Ontario v. Attorney-General for the Dominion, supra*."

After referring to the particulars of that case, their Lordships added:

"The judgment, therefore, as it stands, and the report to her late Majesty consequent thereon, shew that in the opinion of this tribunal matters which are substantially of local or of private interest in a province—matters which are of a local or private nature from a provincial point of view, to use expressions to be found in the judgment—are not excluded from the category of matters of a merely local or private nature, because legislation dealing with them, however carefully it may be framed, *may or must have an effect outside the limits of the province*, and may or must interfere with the sources of Dominion revenue and the industrial pursuits of persons licensed under Dominion statutes to carry on particular trades."

If that were not true, our Provincial Legislatures could do little. And if it is true, why does it not apply to the case in hand? Alberta created the railway company and made a contract with it. In pursuance of that contract, money was raised and was paid into a bank in Edmonton (at all events, the decision would be just the same if the actual specie had been there). The railway company made default. And the legislature in dealing with the situation changed the locus of the money. So far, all that is, indisputably, within the competence of the Legislature. Is the effect which may be produced in Montreal a sufficient reason for ousting the jurisdiction?

JOHN S. EWART.

THE LEGAL SYSTEM OF QUEBEC.*

DEAN F. P. WALTON, MCGILL UNIVERSITY, MONTREAL.

The two great legal systems which between them divide the countries of Christendom, the civil law, derived from the law of Rome, and the common law, based on the customary law of England, are both represented in Canada.

In the Maritime Provinces of New Brunswick, Nova Scotia and Prince Edward Island the view adopted by the Courts and declared by the Nova Scotia Act of 1759,¹ is that these provinces were from the beginning English settlements, and that there, as in the other American colonies, the colonists brought with them all the common and statute law of England applicable to their situation and condition at the time of the settlement.²

When Ontario, under the name of Upper Canada, was carved out of the old province of Quebec, its first legislative Act was to abrogate the French law within its territory and to substitute the laws of England as they stood on the 15th day of October, 1792. In British Columbia, the other province created before Confederation, the English law was taken over as it existed on the 19th day of November, 1856, while in Manitoba, Alberta, Saskatchewan, and the Yukon Territory, the date of the reception of English law is the 15th July, 1870. In eight out of the nine provinces of Canada, therefore, the English law prevails, while the province of Quebec is still governed by the civil law.

For an intelligent study of Canada and its provinces it is essential to bear in mind that Canada as a whole is not governed by one homogeneous body of laws. Accordingly in this article the history of the law of Quebec will be so far given as to make it clear in what respects that province possesses a legal system peculiarly its own.

It should, however, be stated at the outset that, though the law of Quebec differs from that of the other provinces, this is only partially true, since certain branches of the law are the same for all parts of the Dominion.

*This article is to be incorporated in a work by many collaborators to be entitled "Canada and Its Provinces."

¹33 Geo. II. c. 3.

²*Uniacke v. Dickson* (Nova Scotia 1848) James' Rep. 287; *The Queen v. Porter* (1888) 20 Nova Scotia 352.

In the first place, the criminal law of the whole country is the criminal law of England. The French criminal law which was in force under the old *régime* was abrogated by the conquest *ipso facto*, or, if there is any doubt upon that point, was abolished by Murray's Ordinance of 1764. Before Confederation it was, of course, competent for any province to make by statute such modifications as might be desirable. The criminal law was, however, removed altogether from the legislative jurisdiction of the provinces by the confederation statute which transferred it bodily to the Parliament of the Dominion. Since then it has been codified by the Criminal Code of Canada, which came into force on July 1st, 1893, and has since undergone a complete revision. It must not be forgotten, nevertheless, that in principle the English criminal law *en bloc* was introduced into Canada at the Cession or by General Murray, and that the Criminal Code does not repeal the whole of the old criminal law. Acts which are criminal by what may be called the criminal common law of England are still punishable in Canada unless it has been otherwise declared in express terms or by reasonable implication in Canadian legislation. For example the offence of champerty is still known to the law though the Criminal Code does not mention it.³

In the second place, it is generally agreed that there are certain rules of law and especially certain rights and privileges of the subject which belong to public and not to private law. As a part of the constitutional law of the British Empire they are the same in all portions of it, and, therefore, the same in the province of Quebec as in the rest of Canada. It can hardly be disputed for example that such charters of liberty as Magna Charta or the Bill of Rights formed a part of the law of Quebec as soon as the English sovereignty was introduced. It will be necessary to return to this matter, especially since the line of demarcation between public and private law is in some cases by no means easy to draw. For the moment it is sufficient to state that where a question is one which belongs to the public law it is the law of England which must supply the governing principle; and upon such matters the law of Quebec does not differ from that of Ontario or of any other province of Canada.

³ *Meloche v. Deguire* (1903) 34 Can. S. C. R. 24: *The King v. Cole* (1902) 5 Can. Crim. Cases 330.

Thirdly, there is a large and important group of subjects with which the legislature of Quebec would have been competent to deal—subjects in regard to which the law of Quebec was or might be different from that of the other provinces—which were by the British North America Act, 1867, transferred to the Parliament of the Dominion, called into existence by that statute. Most of these subjects, for example Bills of Exchange, Naturalization, Banks and Patents, have been dealt with by federal statutes of a codifying character.

When we speak of the law of Quebec, therefore, as a peculiar and separate legal system, we refer entirely to those parts of that law which do not belong to the criminal law, to public law, or to any subject which belongs to federal authority. In other words it is the law of "property and civil rights" to use the time-honoured formula; but subject to the reserve that some of the subjects formerly covered by that expression were by the Act of 1867 taken away from the provincial control and handed over to the Federal Parliament. A brief indication of what these transferred subjects are will be given later.

The law of property and civil rights which is peculiar to the province of Quebec has, to a large extent, been codified in the Civil Code of Lower Canada,⁴ and in the Code of Civil Procedure the latest revision of which was in 1897. With the exception of the mercantile law, of which an outline is given in the Civil Code, that Code corresponds in form and contents somewhat closely to the Code Civil Français, formerly designed as the Code Napoléon.

The mercantile law of the province of Quebec stands in a somewhat peculiar position, and it will be necessary to say a few words about it at a subsequent stage.

As to the Code of Civil Procedure, with which we are not here specially concerned, it may be said in passing that it is not drawn from French sources to anything like the same extent as the Civil Code. The Commissioners who codified the rules of procedure included remedies, such as writs of injunction, mandamus and prohibition, which our Courts had taken from the English practice, and owing to the differences in the judicial systems of England and France and to other causes, it is probably true that the Code of

⁴ This Code came in force in 1866 before Confederation and still bears the old name of the Province.

Civil Procedure is composed to the extent of one-half or more of rules of English origin.

From what has already been said it will be seen that the special rules of law peculiar to the province of Quebec are to be found mainly in the Civil Code of Lower Canada, in the old law so far as this has not been abrogated by the Code, in the provincial statutes and in the decisions of the Courts.

It is now time to explain how it comes about that this peculiar system of law remains in force in a country which forms part of the British Empire.

Before the French Revolution and the great work of codification to which Napoleon gave his name, France was not governed by a uniform system of law. The country was divided into a great number of districts of varying size, each of which had a customary law of its own, officially edited and printed as a *Coutume*. The royal *Ordonnances*, which correspond to modern statutes, were as a rule, it is true, made to apply to the whole of France. Moreover upon many matters, and among them some of the most important, such as obligations, the *Coutume* as a rule threw little or no light. When questions arose as to which the *Coutume* was silent the Judges had to fall back upon the Roman law, or, more correctly, upon the Roman law in the shape which it had gradually assumed in the writings of modern civilians. The commentaries of these writers formed, as it were, a reservoir or body of supplementary law from which the Judges drew as occasion required.

Among the numerous French *Coutumes*, that of the Capital—the Custom of Paris—had long enjoyed a kind of pre-eminence. In the French colonies it was impossible merely to declare that French law should prevail, since French law was not the same in all parts of France. It was necessary to select a particular *Coutume* and declare that it should apply to the colony, and it was quite natural that in the French colonies the Custom of Paris should be the one to be so selected. The edict of 1663 which set up the Conseil Supérieur, the first judicial and administrative body in Quebec, declared that the council was to decide matters according to the Custom of Paris.⁵

In Quebec, the general ordinances, by which the Custom of Paris had been modified prior to 1663, likewise formed a

⁵ Edits et Ordonnances v. 1. p. 37.

part of the law, unless they were manifestly intended to refer to France only, and the local conditions in the province were such as to make them clearly inapplicable. Moreover, just as in France, the writings of the civilians were referred to for guidance upon doubtful matters. During the period of French rule in Canada, and particularly under Louis XIV., a number of important ordinances were issued in France which codified certain branches of the law, such as the commercial law and the law of wills. There has always been a difference of opinion as to whether these ordinances applied to Canada as well as to France.

On the whole, the better opinion appears to be that before a French Ordinance, subsequent to 1663, took effect in Canada it required to be registered by the Superior Council at Quebec.⁶ Many of the Ordinances were not so registered, and, therefore, upon this view they were not and are not now as such a part of the law of Quebec. The question is of less practical importance than might at first appear because the Ordinances did not make many radical changes, but were on the whole consolidations of the old law which was itself in operation in Quebec. In the province, ordinances modifying the law upon certain points were issued by the administrative authorities, more particularly by the great official called the Intendant, and in course of time there grew up also a considerable body of judicial decisions. The study of the old law of the province as it stood at the date of the Cession has been much facilitated by the two collections published at the expense of the Provincial Government under the titles of *Edits et Ordonnances* and *Jugements et Delibérations du Conseil Souverain de la Nouvelle France*.

The ground has now been cleared for some consideration of the question how far the legal system of the old French province of Quebec was affected by the change of sovereignty under the Treaty of Paris of 1760, and by the subsequent action of the King of England and the British Parliament. In spite of the century and a half which has passed, the controversy in regard to these matters can hardly be considered as closed. Though most of the points in debate are

⁶ *Smyes v. Cuvillier* (1880) L. R. 5 A. C. 138; *Stewart and Molson's Bank v. Simpson* (1894) R. J. Q. 42 B. 30, *per* Taschereau, J., and authorities there cited; F. P. Walton, *Scope and Interpretation of the Civil Code of Lower Canada*, 2 *et seq.*

merely of academic interest, there are still some which are of practical consequence in the year 1913.

The first and by far the most important principle applicable to the circumstances is one upon which all parties are agreed. It is a rule of English law that the conquest and annexation of territory by the King of England does not *ipso facto* alter the system of law previously in force in the conquered country, at any rate so far as private rights are concerned. It is not necessary that there should be any official declaration whether by royal proclamation, order in council, or Act of Parliament, declaring that the former laws are to remain in force. Although nothing of this kind is done the private law is not altered by the fact that the country has now become British territory, and if the law is to be changed this must be done subsequently by competent authority. In the great case of *Campbell v. Hall*,¹ Lord Mansfield reviewed carefully the historical precedents, such as the conquest of parts of France, of Wales and of Ireland, and shewed that in no case had conquest *per se* been treated as sufficient to alter the existing legal system. It is in virtue of this rule of law that in many countries over which the British flag floats a system of law different from that of England still remains in operation. It will be enough to mention the Roman-Dutch law which had been carried by the Dutch to South Africa, Ceylon and British Guiana, and the French law of Mauritius and St. Lucia, all of which have survived the transference of these countries to the British Crown. There is no doubt or difficulty, therefore, in admitting that the Cession of Quebec by France to England still left in full operation in the province the Custom of Paris and the old law generally, so far as property and civil rights were concerned. There is, however, an old controversy never completely settled as to whether after the conquest the English law was not introduced into Quebec by a proclamation of King George III. and by proclamations of the Governor under a special power. Into this dispute it is unnecessary to enter. Whether or not the English law governed for a few years it is at least certain that in 1774, by the Quebec Act, the French law was reintroduced, if it had ever been

¹ (1774) 1 Cowper 204.

abrogated, or was declared to be still in force, if there had never been any valid abrogation.⁸

So far consideration has been confined to private law. When it becomes necessary to deal with the effect of the Cession upon what is called, in a somewhat vague way, "public law," we are upon much more uncertain ground.

There is no doubt that the private law includes among other things the law of personal status, which determines questions of legitimacy, majority, capacity to contract or alienate, marriage, divorce, judicial separation, tutorship, and curatory of incapable persons. It includes also the law of property and succession, the modes in which the power to alienate *inter vivos* or by will may legally be exercised, and the extent to which property may be rendered for a time inalienable by creating a "substitution" or otherwise. Further, the private law regulates the forms of contracts and decides in what cases legal liability may arise without contract. All these are matters which affect the personal rights of citizens *inter se* and do not directly touch the relation between the Government and the governed.

On the other hand, it is clear that a change of sovereignty must carry with it an alteration in the rights and duties which exist between the Crown and the subject, or, as it is expressed under many constitutions, between the State and the citizens. In the case arising out of the conquest of the Cape Colony, Lord Stowell said:—

"I am perfectly aware that it is laid down generally in the authorities referred to that the laws of a conquered country remain till altered by the new authority. . . . But even with respect to the ancient inhabitants no small portion of the ancient law is unavoidably superseded by the revolution of Government that has taken place. The allegiance of the subjects and all the law that relates to it—the administration of the law in the Sovereign, and appellate jurisdictions—and all the laws connected with the exercise of the sovereign authority must undergo alterations adapted to the change."⁹

To begin with, the constitutional powers of the King of England were by no means the same as those of the King of France, and the rights and liberties of Canadians after the conquest became those which were guaranteed to British

⁸ See F. P. Walton, *Scope and Interpretation of the Civil Code of Lower Canada*, 7 *et seq.*

⁹ *Ruding v. Smith* (1821) 2 Hagg. Con. 371, 382.

subjects by the constitutional laws of England. There were not in Canada any more than in England rights which could not be altered by the legislature. But unless they were so altered they were those enjoyed by Englishmen at home. With these rights were associated correlative duties. This point was raised at the very outset by a claim made naturally enough on behalf of the French in Canada by the Marquis de Vaudreuil in the negotiations between him and General Amherst as to the terms of the capitulation of Montreal. Vaudreuil desired that it should be a condition of the surrender that in the event of war breaking out at a future time between France and England the French in Canada should not be required to take arms against France, but the British Government should be satisfied if they maintained an exact neutrality. Amherst, though no lawyer, gave a sound and satisfactory answer to this request by saying, "They become subjects of the King," meaning that their rights and duties were to be the same as those of other British subjects. It is possible, of course, by Act of Parliament to deprive certain classes of British subjects of rights which other subjects enjoy, and many illustrations, ancient and modern, might be given, such as the exclusion from the franchise of Roman Catholics and Jews in former times, or of Chinese British subjects in British Columbia to-day. But apart from special legislation the rule is that the rights and duties of British subjects do not depend upon race or creed, or on the fact that some of them are British subjects by birth while others have become so at a later period. No more fatal mistake could have been made at the beginning of British rule in Canada than to lay down the principle that the citizenship of French Canadians was to be in any respect different from that of their fellow-subjects.

Further, as the powers of the new Sovereign are, in consequence of the conquest, substituted for those of the former ruler, so it must be with all the officials who exercise an authority delegated by the head of the State. A change of sovereignty necessarily involves the downfall of one official hierarchy and the setting up of another. All Courts, criminal, civil, or ecclesiastical, which belonged to the old order are *ipso facto* dissolved by the removal of the Sovereign from whom they derived their power, and the powers and prerogatives of the new Courts which are established will, so far as not specially determined by the administrative or legisla-

tive Acts creating them, be those which are given by the constitutional law of the conquering State. It is on this principle that the Superior Court has been held to have jurisdiction to quash a municipal by-law, because such a power is inherent in the Courts of superior jurisdiction under the English law.¹⁰ So also the rules of English law determine in Quebec the conditions under which the writs of mandamus, prohibition or *quo warranto* will issue against officials or public bodies. Mandamus for example will not issue to compel an official or a public body to act in a certain way or refrain from acting if there was a discretion to be exercised by the authority whom it is sought to coerce.¹¹ The power of a Court to punish for "contempt" is governed by English rules, and so is the degree of authority which Courts of civil jurisdiction are bound to allow to the decisions of criminal Courts.¹²

Again, the important doctrine of English law that the Crown can only be sued by its own consent and upon a petition of right, and that this remedy is not available when the claim is based on tort, is part of the public law. It is true that in Canada an important exception to this rule has been made by the statute under which the Crown is made liable for death or injury to the person or to property on any public work resulting from the negligence of any officer or servant of the Crown while acting within the scope of his employment.¹³ Public works, such as railways and canals, are in Canada operated by the Government to a far greater extent than in England, and it would be inequitable to allow the Crown a complete exemption from liability in such cases of negligence.

But though the powers and prerogatives belong to the public law so far as rights of government are concerned, there are some rights which the Sovereign enjoys which depend upon the private law of the province. For example, the question whether the Crown as a creditor has a privilege over other creditors, and if so to what extent, is one which falls to be decided by the law of Quebec and not by that of England.

¹⁰ *Regina v. Waterous Engine Works Co.* (1893) R. J. Q. 32 B. 235.

¹¹ *College des Medecins v. Paulides* (1892) R. J. Q. 1 Q. B. 405; *Gourdeau v. Cite de Québec* (1911) R. J. Q. 40 S. C. 388.

¹² *Fournier v. Att.-Gen.* (1910) R. J. Q. 19 K. B. 431; *City of Montreal v. Lacroix* (1909) 19 K. B. 385.

¹³ *Rev. Stat. Can.* (1906) c. 140 s. 20 c. See *Letourneau v. The King* (1903) 33 Can. S. C. R. 335.

Perhaps the most important class of cases in which the public law of England differs from that of France is that in which actions are brought against public officers for alleged wrongful acts done in their official capacity. It is a fundamental principle of English law that if an official wrongs a private person he is accountable like anybody else to the ordinary Courts, and it is no defence that he acted in good faith or in obedience to the order of his official superior. By the law of France or Germany, as by that of most if not of all of the legal systems of continental Europe, very different ideas on this subject prevail. The moment an act is official the jurisdiction of the ordinary Courts to decide as to its wrongfulness or otherwise is completely ousted. Any claim based upon it must be brought before a special tribunal mainly composed of officials and naturally inclined to look with a lenient eye on the acts of government servants. Under our system if there is any bias it is generally against the official, and experience shows that juries are by no means averse to giving heavy damages against an officer of the government who has abused his authority and interfered with the freedom of the lieges. Under the French system it is, on the other hand, extremely difficult to get any remedy by legal process against wrongs of this kind. A special Court exists, called the *Tribunal des Conflits*, whose sole function is to determine whether the act complained of was done by the officer in the real or mistaken exercise of his duties, in which case it is an official act, or if it was entirely unconnected with his functions and therefore an example of *faute personnelle*. In many cases, if the decision of the *Tribunal des Conflits* is that the act was an official one, the complainant does not think it worth while to carry the case further.¹⁴ In Quebec it does not seem to have been doubted from the beginning that in regard to this matter English rules were to prevail, and actions of damages against public officials of all grades for wrongful exercise of their authority are perfectly familiar.

There are, however, certain classes of cases in which more difficulty is found in determining the preliminary question, whether they belong to the sphere of public law. For example, when a newspaper is sued for libel is the de-

¹⁴ See Dareste, *La Justice Administrative en France* (2nd ed.) esp. 515 *et seq*; *Pandectes Françaises, s. v. Autorité Administrative* n. 8 and n. 215; *Ibid. s. v. Conflits*, n. 57 and n. 684.

fence of fair comment upon a matter of public interest a valid defence in the Courts of Quebec as being the rule of English law, whether the French law is the same or not? There are a number of dicta of learned Judges to this effect on the ground that the degree of liberty granted to the press is a matter of public law.

Similarly, opinions have been expressed that all questions which concern the relation of the subject to the administration of justice belong to the public law. If this general rule is well-founded it would cover actions for libel based upon injurious language used in pleadings or by a witness in the box, and actions for false arrest or malicious prosecution. The tendency of recent cases, however, is against regarding such matters as part of the public law, but the point can hardly as yet be considered as finally settled.¹⁵

Unfortunately, very little can be found in the reports of English decisions or in the works of authority upon the distinction between public and private law. This is not surprising because in the English Courts nothing turns on the distinction. The Judges have to apply the law and whether it is public or private makes no difference. In Quebec where the distinction is capital, because upon it depends whether the case is to be governed by English or by French law, the authorities are so far very meagre. Judges, not unnaturally, are disposed to follow the line of least resistance and to shirk the difficulty where that is possible by saying that in the case before them there would be no difference between the English and the French law.

The commercial law has been referred to earlier in this article as standing in a somewhat different position from the general body of private law. Among laymen there is a popular misapprehension that the commercial law of Quebec is English. As a statement of principle this would not be accepted by lawyers, but it is less wide of the mark than might at first appear.

As early as 1785 a statute was passed introducing the English rules of evidence in commercial matters.¹⁶ Subject to the familiar exceptions admitted in England, parol testimony was to be sufficient to prove commercial contracts.

¹⁵ *C. P. R. v. Waller* (1911) 1 Dom. Law Rep. 47 (C.A.); *Carrington v. Russell* (1912) R. J. Q. 42 S. C. 71.

¹⁶ 25 Geo. III. c. 25; 10 Consol. Stat. Lower Can. c. 82, s. 17.

After the Cession the commerce of the country, and more particularly the foreign trade, fell mainly into the hands of the English speaking part of the community. Their business was principally with England, with the United States, or with the other provinces of Canada, and all of these countries were governed by the English law. It was natural, therefore, that English commercial usages should become more familiar than French, and that in the Courts great deference should be paid to the decisions of English Judges who had explained the English usages. At the same time some of the French ordinances, and particularly the so-called Code de la Marine of 1681 were not without great influence. It must not be forgotten that English commercial law in its present shape is mainly the creation of the eighteenth century, and is to a large extent the work of Lord Mansfield and other Judges who applied in practice and elevated to the rank of rules of law the customs of merchants and the theories about these customs, formulated by civilians, mostly French or Dutch. What is called the English commercial law is by no means wholly of English origin, and it differs widely in this respect from much of the common law which strikes its roots deep down in English soil. The commercial law, like the Roman *jus gentium*, is an eclectic system, consisting of rules which, being grounded on principles of natural equity and for the most part consecrated by long practice among traders, can without hardship be made to apply to the transactions between men who reside in different countries and are governed in other matters by different laws. Both the English Judge and the Roman *praetor* framed many such rules in cases in which no foreign party was concerned, but in the mind of both there was the more or less conscious intention to lay down principles suitable to be applied in questions between traders, whatever might be their respective nationalities. The fact that the commercial law as applied in England was itself taken to no small extent from French sources no doubt helped to ensure it a favourable reception in Quebec.

The commissioners who drafted the Civil Code of Lower Canada state very clearly the difference between the commercial law and the civil law of the province in regard to their origin. They say:

In a few instances the rules of the commercial law may be found in the statute book or in the ordinances of France,

but much of it is to be sought in usages and jurisprudence. Our system, if system it may be called, has been borrowed without much discrimination, partly from France and partly from England; it has grown up by a sort of tacit usage and recognition, without any orderly design or arrangement, and has not as yet received any well-defined or symmetrical form from the decisions of our Courts."

The codifiers might have thought that the time had come but they evidently shrank from the task and rather excused the very meagre outline which they give of it by saying:—

"Much of what has been established by usage may more safely be left to be interpreted in like manner and to be modified as new combinations and experience of new wants may suggest."¹⁷

In speaking of the commercial law of the province of Quebec it is important to notice that in the arguments before the Courts English and American cases and cases decided in the other provinces of Canada are constantly cited. Although such cases are referred to not as authorities binding upon the Court but as illustrations of the applications of similar rules, it is an undoubted fact that the practice of looking to them for guidance tends strongly in the direction of assimilation. The fact also that the majority of the Judges of the Supreme Court and of the Judicial Committee of the Privy Council have been trained in the common law cannot fail to exercise some influence. In cases, for example, where the French authorities are conflicting, and the rule in Quebec is not settled, any Court with a composition like that of the Supreme Court or the Judicial Committee must have an inclination to hold that the law of Quebec does not differ from that of the other provinces.

Upon such a question for example, as whether a contract is complete when an acceptance has been made, or if, on the other hand, it remains incomplete until the offerer has received notice of the acceptance—a question never finally settled in France—the Supreme Court naturally adopted the former theory, which is in accordance with the law of England and Ontario.¹⁸ Even those who are most jealous to preserve the purity of the civil law of Quebec

¹⁷ Commissioners' Reports, v. 3 p. 214.

¹⁸ *Magann v. Auger* (1901) 31 Can. S. C. R. 186. Cf. *Toulouse* (13 juin, 1901) *Dall. Pér* 1902. 2. 15.

can hardly regret that in regard to rules of this kind some weight should be given to the advantage of having the same rule for the whole of Canada. In commercial matters, at any rate, it is safe to affirm that a gradual assimilation of the law of Quebec to that of the rest of Canada has long been going on and is now fairly complete.

It is not necessary in this place to do more than indicate in a very general way the subjects which have been withdrawn from the control of the provinces and handed over to the Dominion Parliament. The consideration of the respective spheres of the Parliament of Canada and the Legislatures of the provinces belongs to the Constitutional Law and will not be treated in this article.

Broadly speaking, the intention was to leave to each province its complete autonomy in regard to matters which did not affect persons outside its limits, and to transfer to the Dominion the control of those matters which affected the Dominion generally, or, at least, two or more of the provinces. Applying this canon no difficulty arises in regard to the postal service, the census, the military and naval services, shipping, quarantine, currency, bills of exchange, interest, patents and copyrights, weights and measures, the criminal law, the law of naturalization, and the laws relating to Indians. These are all of them matters which plainly affect the Dominion as a whole. And it is equally clear that the railways, ferries, canals, telegraphs, and other works, which extend beyond the limits of a province or connect one province with another, could not be provincial matters. In regard to two of the transferred subjects, namely, banks and fisheries, there might, but for the express language of the Act, have been room for doubt, but it was felt to be desirable to place the financial system of the country and the fisheries, whether on the sea coast or inland, under a single control, and therefore the legislation in regard to these matters was placed under the federal jurisdiction. In the case of the fisheries in waters belonging to the Crown, the transfer of legislative authority did not affect the right of property enjoyed by the government of the provinces as representing the Crown.

Provision was also made for the case of works which, although wholly situate within a province, might be upon such a scale or of such a character as to justify their being

regarded as Dominion matters, and it was enacted that such works, either before or after their execution, might be declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more of the provinces.

Over the works and undertakings which are not confined within provincial boundaries, or, if so confined, have been declared to be of general advantage, the Parliament of Canada has exclusive authority, and it is in virtue of this power that the great railways, telegraphs, telephones, and express companies are regulated by Canadian laws and are placed under the control of the Railway Commission. The Commission, under its delegated authority, can determine what conditions shall be inserted in bills of lading or other contracts necessary for these businesses, and to what extent the companies may limit their liability.

Up to this point the distribution of legislative powers is sufficiently clear, but there are certain of the transferred subjects which have not yet been mentioned in regard to which serious doubts have been felt. In spite of the very considerable number of cases which have been decided upon some of them, there are still many points of general importance which remain doubtful.

The Dominion Parliament was given exclusive legislative authority as to the "regulation of trade and commerce." By giving these words a wide interpretation the whole of the commercial law might have been placed under the control of the Dominion; but a much more restricted meaning has been given to them by the Courts. It has been held by the Privy Council that the words must be taken to mean the power to make political arrangements in regard to trade, and regulations as to trade in matters of interprovincial concern, and perhaps general regulations affecting the whole Dominion. But a law, for example, that certain clauses should be implied in all policies of fire insurance issued in a province is within the provincial power, and is not such a regulation of trade as is competent only to the Dominion.¹²

It is under its power to regulate trade and commerce that the Federal Parliament passes such general measures as the Insurance Act, the Trades Union Acts, the Alien

¹² *Citizen's Insurance Co. v. Parsons* (1881) L. R. 7 A. C. 96.

Labour Act, the acts for the inspection and standardization of wheat and some other staples, the laws to prevent the adulteration of food and many others. In regard to some of the provisions in the Insurance Act and in some of the other acts passed under this power it is by no means certain that the Federal Parliament has not invaded the provincial field.

Again, the province has power to incorporate companies *with provincial objects*.

But what limitation is intended to be created by the words in italics? Does it mean that companies incorporated by a Provincial Legislature must confine their business within the province which has given them a legal status? Upon this view an insurance company incorporated by a province would be debarred from taking risks outside that province. The great division of opinion among the Judges of the Supreme Court shows how hard it is to give an intelligible meaning to the words "with provincial objects," as determining a class of companies, and until a decision of the Privy Council has been obtained, the point will remain doubtful.²⁰

Further, the province has exclusive power to legislate as to the solemnization of marriage in the province, while the Dominion has a similar power with regard to marriage and divorce. How is it possible to reconcile the two powers? If, for example, the province enacts that the marriage of two Roman Catholics shall not be valid unless celebrated by the proper priest of their church, is this legislation which transcends solemnization and, by affecting the validity of the marriage, invades the sphere of Dominion legislation? Must laws dealing with solemnization be limited to laying down regulations as to banns, licenses, officiating persons, and the like, and imposing penalties for breach of such regulations, but always subject to the limitation that the marriage itself shall not be annulled if celebrated by any marriage officer? This contention has recently been rejected by the Privy Council, and it has been held that under the provincial law it may be a condition of the validity of the marriage that it should be performed by the priest or minister of the religion of the parties or one of them, though in the opinion of the

²⁰ *C. P. R. v. Ottawa Fire Insur. Co.* (1907) 39 S. C. R. 405.

Supreme Court this condition has not yet been imposed.²¹ These examples may serve to illustrate the difficulties of interpreting the sections of the British North America Act, which contain the distribution of legislative powers.

Under the Canadian constitution the whole field of legislative power is divided between the Federal and Provincial Parliaments. If the enactment is one which is to take effect within Canadian territory the power to pass it must reside either with the Dominion Parliament or with the Provincial Legislature. The only exception to which this statement is subject is the very rare case of the Act which has been passed being one which conflicts with an imperial statute dealing with the same matter and applying to Canada.²²

There is not any written constitution for the Dominion, or for the separate provinces by which certain subjects are withdrawn from the legislative jurisdiction. This creates an important difference between our constitution and that of the United States. An American law may be held to be invalid because it is contrary to the constitution of the United States, or, in the case of a State law, because it is contrary either to the constitution of the United States or to that of the State in which it was passed. Thus, for example, Workmen's Compensation Acts have been held invalid on the ground that to make the employer liable without proof of fault was such a taking away of property without process of law as was forbidden by the constitution.²³ Under our system this would be impossible, not because the Courts have less power than those of the United States, but because there is no constitution which restricts the freedom of the Legislatures. If the province has authority to pass laws dealing with the relation of employer and employed, any legislation which it passes, however, revolutionary in character, is perfectly valid. The constitutional doctrine of the sovereignty of Parliament is as applicable to the provincial Legislatures as to the Parliament of the Dominion, or even to the Imperial Parliament, provided always that

²¹ *In re Marriage Laws* (1912) 46 Can. S. C. R. 132.2. *In re Marriage Legislation in Canada*, [1912] 1 A. C. 880. The Privy Council found it unnecessary to express an opinion on the second point. Their judgment is not yet reported.

²² *Att.-Gen. for Ont. v. Att.-Gen. for Can.*, L. R. [1912] A. C. 571.

²³ See *Ives v. South Buffalo Ry. Co.* (1911) 201 N. Y. 271 and article of Prof. Wambaugh in 25 Harv. L. Rev. 129.

the province was dealing with a subject included in the field of legislation assigned to it.²⁴

This principle is in no way affected by the administrative veto, a power in any case very sparingly exercised.

No description of the legal system of Quebec can be at all complete without some notice of the important difference which exists between that system and the English law in regard to the authority of judicial decisions.

Without attempting to state fully the English rules on the subject, it may be said that the judgments of a higher Court, by which a point of law is decided, are binding upon all Courts of inferior jurisdiction when the point which has been so decided comes up before them in a subsequent case, and that the higher Court itself is bound to follow its own previous decision. As Gulliver rather cruelly expressed it "If once Judges go wrong they make it a rule never to come right."

All the systems of law based on that of Rome start with a principle fundamentally opposed to this. *Non exemplis sed legibus judicandum est*. President de Thou, speaking of the French law says *Les arrêts sont bons pour ceux qui les obtiennent, il faut se garder de les invoquer comme une autorité décisive*.

English and American Judges regularly support their opinions by reference to previous decisions, whereas in France a Judge is not allowed to give a previous case as one of the *motifs* of his judgment. The Courts of Quebec follow in principle the French and not the English rule in regard to the value of precedents, though, perhaps owing to English example and to the attitude of mind of Judges of the Supreme Court and of the Privy Council, previous judgments are treated with more respect in Quebec than is the case in France. In a recent case in Quebec the rule was thus stated by Cross, J.:—

"The binding authority of precedents is characteristic of English law. With us the Code is the law whilst decisions are particular applications of the law."²⁵

The English system undoubtedly leads to an occasional miscarriage of justice. The Court decides a question in a

²⁴ See *Beardmore v. City of Toronto* (1910) 21 Ont. L. R. 505.

²⁵ *Le Procureur General de la Province de Québec v. MacLaren* (1911) R. J. Q. 21 K. B. 42, 58.

certain sense, not because it is convinced that this is the correct view, but because the point has been so decided by another Court. A volume might be compiled of "Cases reluctantly followed." In rare instances the Legislature may take action, but a remedial statute will rarely, if ever, be retroactive, and the defeated litigant has to be content with the satisfaction of knowing that the injustice done to him has led to a legal reform.

On the other hand the English system has the virtue of greater certainty. It is possible to predict with more confidence in what sense a point will be decided, and lawyers and men of business can make their arrangements accordingly. If the French theory were carried to the logical extreme every Judge would be free to give his own interpretation of the law, and previous judgments would afford no guide. The judgments of the higher Courts would not necessarily carry any weight with Courts of inferior jurisdiction. But, apart from the fact, that a Court of Appeal which has decided a legal question is not likely within a short time to decide it in the opposite sense even though perfectly free to do so, the Courts of appeal recognize that it is their duty to settle the law so far as they can. This being so, inferior Courts are not disposed to give decisions which they know will be reversed on appeal if the case goes further, or, in unappealable cases to incur the suspicion of bias by giving a decision contrary to the known views of the higher Court. The result is that both in France and in Quebec, and indeed in all countries where a civil law system prevails, a working compromise is arrived at, that where there is a "jurisprudence" upon a certain point this is not to be disturbed unless it be by a Court of higher jurisdiction than the Courts which created the "jurisprudence." And "jurisprudence" is defined as "the habit of the Judges to decide or interpret a question in a well-defined sense."

In Quebec, it is admitted that an inferior Court may decline to follow one judgment or even two judgments of a superior Court in order to give that Court an opportunity to reconsider the matter. When, however, a superior Court has on several occasions reached the same conclusion there is a settled jurisprudence which ought to be followed both by that Court itself and by all Courts of inferior jurisdiction.²⁶

²⁶ See *Gucrtin v. Molleur* (1902) R. J. Q. 21 S. C. 261.

Where the Courts which pronounced the judgments relied upon were themselves divided in opinion it will be more easy to reach the conclusion that the jurisprudence is not settled.

In principle it would appear that the Supreme Court of Canada in cases from the province of Quebec has the same freedom in regard to previous decisions as the Courts of the province. The composition, however, of that Court, consisting as it does of five Judges trained in the common law, and two only from the province of Quebec, inclines it to a stricter view of the binding character of precedents. But, though the Supreme Court will very rarely overrule a previous decision of its own, it is not absolutely bound to follow it, in the sense in which the Court of Appeal or the House of Lords in England would be bound in similar circumstances.²⁷

Montreal.

F. P. WALTON.

²⁷ See *Desormeaux v. Ste. Therese* (1910) 43 Can. S. C. R. 82; *Shawinigan Hydro Co. v. Shawinigan Water Co.* (1910) 43 Can. S. C. R. 650.

NEUTRAL CONSULS IN WAR-TIME.

The alleged improper treatment—which ranged from manslaughter to isolation—of an Austrian consular officer by the Servian forces in Western Turkey, has formed the occasion of much strong language in the Press. This newspaper campaign appreciably embittered Austro-Servian relations. As we have seen, had they enjoyed the full character of ambassadors, it would not have entitled them to the privileges of ambassadors to Servia. Grotius and Bynkershoek lay this down explicitly, and so does Wicquefort. More recent critics incline to consider ambassadors entitled to an undisturbed transit through the territory of third parties. But no one asserts that an ambassador is to be allowed to remain in the territory of a third power, with the enjoyment of diplomatic privileges, including that of leaving when he feels inclined. The question of the treatment in war of the ambassadors at the enemy's Court has not often arisen. For, except in the case of complete conquest, the Court and the *corps diplomatique* do not often come under the direct power of the enemy. It arose in the Franco-Prussian war when the U. S. Ambassador (Washburn) desired to send despatches out of Paris through the German lines, and was refused permission, in spite of the protests of the American Government.¹ It indirectly arises in the circumstances of the present war, because of this partial participation of a multitude of consuls in the ambassadorial character. It must, however, be concluded that this quasi-diplomatic status does not in this case improve their position. The invading power is not an Oriental State, but a civilized European country. Consuls in Servia are not, we apprehend, invested with any diplomatic character. Their diplomatic position is a practical necessity when a country such as Turkey is concerned. But its necessity falls to the ground in presence of a fully civilized invader; and the consular character alone remains effective. And that is a character which the invaders are under no obligation to recognize.

¹For this illustration we are indebted to Prof. Oppenheim (Int. Law, sect. 399), who nevertheless treats the question of the right of ambassadors as against invaders as an open one.

ARMISTICES.

The conclusion of an armistice is almost always surrounded with considerable difficulty, on account of the position of besieged forces belonging to one side or other. If they are relieved, they are better off than before: if they are not relieved, they are worse off. Armistices usually stipulate for the observance of the *status quo* during their currency, but besiegers ask nothing better. The suspension of arms under such a condition carries on their siege for them at a minimum of trouble to themselves. If the duration of the armistice is ascertained, it might be possible to allow a corresponding quantity of provisions to be taken in. But if it remains unknown, the only course would be to furnish rations from day to day—and this would involve so much communication between the besiegers and besieged, and the imparting of so much accurate information as to the resources and requirements of the garrison, that it cannot always be a practical possibility.

Yet, if anything like equality of terms is to be observed, some measure of relief must be afforded. When one party to the negotiations, however, is in a position of marked superiority, it has sometimes been refused, and the war has virtually proceeded in these quarters, by the slow reduction of the resources of the besieged. Continuous pressure is thus exerted on the enemy. It was no doubt for this reason that the German forces before Paris, in November, 1870, declined to make it a term of a proposed armistice that the city should be reprovisioned.¹

It is of course open to the opposing party to say whether or not they will accept a suspension of hostilities on such terms.

Morin states that on the occasion of an armistice in 1774, between Turkey and Russia, provisions were admitted into blockaded ports, whilst in 1797, when Lazare Hoche had surrounded Mayence and Ehrenbreitstein, a weekly reprovisionment was allowed during a suspension of hostilities. On the occasion of the siege of Mantua in 1811, elab-

¹ By the armistice which took place on the capitulation, revictualment was not to take place until the forts surrounding Paris had been put in the hands of the Germans.—(*Samicer*, Vol. 6, p. 629): 28 Jan., 1871.

orate precautions were taken specifying the amounts of victuals to be taken in, and placing the periodical revictualments at intervals of ten days. So, in 1813, when Napoleon besieged Dantzic, Stettin and Cüstrin. Morin also observes that after Sadowa a revictualment was allowed *presque illimitée* in the case of a large town like Olmütz, but on a restricted scale for fortresses.² He attempts to found on these instances a general rule making revictualment imperative, and quotes Thiers as insisting to Bismarck on—*"ce grand principe des armistices, qui veut que chaque belligérant se trouve, au terme de la suspension des hostilités, dans la même situation qu'au commencement."* . . . Otherwise, he goes on, "an armistice would be enough to secure the reduction of the strongest fortress existing."

But it seems really to be a matter of bargaining. If the terms are hard, and invoke a progressive weakening of the position, it is for the other side to refuse them. There is no compulsion to make an armistice.

In the case of Adrianople, it was obviously impossible for Turkey to refuse them. The armistice is only local, and does not suspend the active operations of war in every quarter. So long as the Greek army remains actively engaged, all other considerations are of quite minor importance. A power which agreed to negotiate without an entire suspension of arms would hardly be likely to insist on the relief of an individual town.

² This was not by the armistice concluded by Moltke (given in *Samwer*, IV, 319), but a confirmation by Bismarck of even date (26th July, 1886).

EDITORIAL.

All communications should be addressed "The Editor" Canadian LAW TIMES, 705 Confederation Life Building, Toronto.

The Editor will be pleased to receive contributions on any subject of legal interest, and will pay for all articles accepted.

REMUNERATION OF COUNTY JUDGES.

At a time when the cost of living is a subject of discussion, owing to the fact that the price of necessities has arisen out of all proportion to the increase of salaries, this is especially the case with professional men. Trades Unions and similar organizations look after the interests of their members, both as to the number of working hours per week and the payment per hour, but although tribute may be given to ability and position, the matter of remuneration is seldom if ever seriously considered. With the public a general impression exists that a Judge or other occupant of any important position receives so large a salary that the question of money is never a matter of concern; but if the manufacturer or man in business actually knew how insignificant the remuneration of the occupants of the Bench, especially those of the County Courts, and the interminable number of hours worked, a just appreciation would be back of the question at present under consideration of the Minister of Justice, namely, *a revision of salaries*.

(Taken from the report of the Inspector of Legal Offices.)

"Figures given below will afford some idea of the arduousness of the work performed by County Court Judges, especially in counties in which are situated the large cities, the larger the city the greater the amount of work.

"In Toronto, for instance, the County Court Judges for the County of York sit practically continuously. Their work has been greatly increased by the enlargement of the jurisdiction of County Courts by which cases formerly coming up for trial in the High Court are now heard in the County Court, a change which has sensibly decreased the cost of the litigants and has reduced the work of the High Court Judges at least 40%.

"The gradual increase in the work of the County Court Judges has been continuous for practically twenty years, while during the whole of that period salaries have remained stationary, no allowance being made either for excess of

work or increase in the cost of living owing to changes in economic conditions.

“Adjustment of matters so as to make provision for an adequate remuneration to Judges of the County Court is a matter of vital importance, both to the legal profession and the general public, since efficiency of Judges is one of the bulwarks of our liberty.”

COUNTY COURTS.

Civil Actions—1911.

	Whole Province except York.	1911 County of York.	1912 York.
Jury	130	92	118
Non-Jury	322	231	272
Total	452	323	390

In 1911 civil actions in the County of York were within 129 of those tried in the rest of the province, and in 1912 only 62.

GENERAL SESSIONS OF PEACE.

1911.	1912.
Whole Province except York.	County of York.
92	242

COUNTY COURT.—1911.

Ottawa—Hamilton—London—Toronto—	
Number of civil actions tried in Carleton, Wentworth, Middlesex, and York	446
Number of civil actions tried in balance of counties in Ontario	329
	117

OR

117 more in Carleton, Middlesex, Wentworth, and York than in remainder of province.

GENERAL SESSIONS OF PEACE.—1911.

Ottawa—London—Hamilton—Toronto—	
Trials in Carleton, Middlesex, Wentworth and York	290
Trials in balance of counties in Ontario	598

OR

only 308 more in whole province than in these counties.

SURROGATE COURT.

Ottawa—Carleton—	1902	1911
Probates Issued	122	179
Letters of Administration	74	101
London—Middlesex—		
Probates Issued	198	251
Letters of Administration	81	110
Hamilton—Wentworth—		
Probates Issued	154	218
Letters of Administration	84	102
Toronto—York—		
Probates Issued	371	712
Letters of Administration	267	550

COUNTY COURTS.

Civil Actions Tried.

	1902	1911
Ottawa—Carleton—		
Jury	10	7
Non-jury	18	34
London—Middlesex—		
Jury	2	16
Non-jury	3	20
Hamilton—Wentworth—		
Jury	16	25
Non-jury	9	21
Toronto—York—		
Jury	31	92
Non-jury	38	231
Total trials	127	446
Total in Carleton, Middlesex and Wentworth ...	123	
Total in York	323	
Or 200 cases more tried in Toronto than in Ottawa, London and Hamilton.		

COUNTY COURTS.

*Criminal Trials, 1911.*Sessions County Judge's
Criminal Court.

Ottawa—Carleton	2	16	18
London—Middlesex	7	16	23

	Sessions Co.	Judge's C.C.
Hamilton—Wentworth .. 1	80	81
Toronto—York 86	82	168
	<hr/>	<hr/>
	96	194

Or 46 more in Toronto than the other three.

COUNTY COURTS.

Days' Sitzings.

	Number of days sitting for Civil trials.	Number of days sitting for Criminal trials.
Ottawa—Carleton	37	44
London—Middlesex	22	44
Hamilton—Wentworth	33	58
Toronto—York	207	192
	<hr/>	<hr/>
Total	299	355
In balance of counties of Ontario	410	731

Or only 111 more days in whole province. And 115 more days in Toronto than Ottawa, London and Hamilton for Civil trials; and 29 more days in Criminal trials.

COUNTY COURTS.

	Writs issued in	
	1911.	1902.
Ottawa—Carleton	257	142
London—Middlesex	170	92
Hamilton—Wentworth	289	117
Toronto—York	1,708	450
	<hr/>	<hr/>
Total	2,424	701
In other counties of Ontario	2,235	

Or 189 more in Carleton, Middlesex, Wentworth, and York. And 992 more in Toronto than Ottawa, London, and Hamilton. And 527 more in Toronto than the whole province, excepting Ottawa, London, and Hamilton.

DIVISION COURTS.

	Number of suits entered 1912.
Ottawa—Carleton	2,423
London—Middlesex	2,485

	No. of Suits 1912.
Hamilton—Wentworth	2,545
Toronto—York	8,465

Total in Carleton, Middlesex and Wentworth 7,453

Total in York 8,465

Or 1,012 more in York than in the other three.

DIVISION COURTS.

	Number of suits entered 1912.
Ottawa—Carleton	2,423
London—Middlesex	2,485
Hamilton—Wentworth	2,545
Toronto—York	8,465
	15,918
In other counties of Ontario	65,373

CIVIL ACTIONS TRIED IN PROVINCE OF ONTARIO, EXCEPTING TORONTO.

1911.

	High Court.	County Court.
Jury	142	130
Non-jury	275	322
Total	417	452
In Toronto:—		
Jury	90	92
Non-jury	189	231
Total	696	775

Or 79 more County Court actions tried in Ontario than in the High Court. And only 129 less in County Court trials in Toronto, than the whole province, including Ottawa, London, and Hamilton.

No returns have been received for 1912, in which year the volume of work was much greater than in 1911.

CITY OF TORONTO V. BELL TELEPHONE CO.

The Dominion Railway Board, through Commissioner Scott, has given a decision in an application by the city of Toronto to have the Bell Telephone rate of \$30 apply to Moore Park and North Toronto.

During the course of the argument, which was made before Commissioner Scott and A. S. Goodeve (Commissioner Drayton declining to act on account of his having occupied the position of Corporation Counsel when this question first came before the Railway Board), it was contended for the city that any difference in the rate charged was discrimination, and therefore contrary to law. The telephone company, through its manager, offered the ordinary city rate of \$30 to one section which was wholly within the limits and it was impossible for them to do otherwise, but submitted they were entitled to charge, in addition to the regular rate, a mileage rate for the section further north. This would be discrimination against one citizen in favor of another, of \$20 up to \$80. The judgment of the Board has upheld the telephone company's contention; but by what method of reasoning or following of what precedent they have arrived at such a decision it is extremely difficult to understand.

The Dominion Railway Board, under the chairmanship of the late Judge Mabey, had achieved a position of importance at least the equal of any Court in the country, and its decisions were held in the highest respect, and accepted as the solution of many intricate problems, not only by those in whose favor decisions were given, but also by those, oftenest corporations, to whom the decisions were adverse. Questions such as disputes between municipalities and corporations like the Bell Telephone Co. are of national importance, and require big broad-minded treatment in their solution, and in the minds of most people there is little doubt that if the question came up for adjudication before one of the Appellate Courts or before a Board of Judges, no such decision as that given by the Railway Board, adverse to the interests of the municipality, would ever have been given. The question of the Chairman declining to act, is debatable. If when acting as Corporation Counsel, Mr. Drayton's advice was correct, and if the claim of the municipality is a just one and any difference in the rates

charged one citizen in favor of another is undue discrimination, then there appears no valid reason why the change of position from Corporation Counsel to Chairman of the Railway Board would work injury to either party. Many people are asking the question "Is this the time to shirk responsibility?" for there are so many questions coming to the Railway Board for adjustment in which the interests of the municipalities and that of various corporations must of necessity clash that one may well question whether the Chairman will act at all.

It would be a pity if the standard set up by the Dominion Board up to the present should be lowered and that it should descend to the level at times reached by its prototype of Ontario.

PERSONAL.

In the dining-room of the historic Law Society of Upper Canada at Osgoode Hall, the Benchers met at one o'clock on March 24th, for an unusual purpose, to congratulate Sir Æmilius Irving, treasurer and chairman, on the 90th anniversary of his birth.

Around the mahogany were gathered eminent lawyers, the Lieutenant-Governor, representatives of the Judiciary, and the Attorney-General, and among others present were two sons of the guest of honor.

An address was read, and, handsomely bound, beautifully illuminated, with Sir Æmilius' family crest; it will go down to future Irvings as a family heirloom.

But even the ornate address was second to the magnificent casket of Canadian material, Canadian skill, and Canadian art.

Curly maple is the wood, and silver and gold have been used by deft hands in producing a gem of its kind. A silver pillar supports each corner, and Sir Æmilius looks out, an excellent likeness, between the allegorical figures of law and justice. The arms of the Dominion are engraved at one end, and the whole surmounted by the arms of the Law Society itself.

On a silver scroll is this inscription:—

"Sir Æmilius Irving, K.C., Treasurer of the Law Society of Upper Canada. From his fellow Benchers, March 24th, 1913."

The address to Sir Æmilius reads as follows:—

HONOURED AGE.

"Your fellow-Benchers desire to take advantage of the interesting and notable opportunity afforded by the 90th anniversary of your birth to accompany the congratulations and cordial wishes suitable to such an occasion with some expression of the appreciation of your long and faithful devotion to the interests of the profession in this province and with some mark of the esteem and affection with which we have so long regarded you. Your long and loyal tenure of the high and responsible office of treasurer has been characterized by those qualities of assiduity, vigilance, dignity, and wisdom, which have reflected lustre upon the office, and have always contributed to the highest and best interests of our

common profession. You have presided over our deliberations with an unvarying courtesy, a prudent firmness, and a nicely-balanced impartiality, which have conduced to the happiest results. It will, we hope, be an unfailing source of satisfaction to you to know that you have inspired, and will always retain, our unfeigned esteem and respect in your high office and our warmest affection in your person and character. We trust you may be spared for many peaceful and happy years to your family and friends. We beg your acceptance of the accompanying memento of the occasion."

Sir *Æmilius* was called to the Bar in 1849, and he has been treasurer of the Law Society for twenty years.

Twenty-five of the leading counsel of Alberta have been named King's Counsel. The list includes men on both sides of politics and shews no signs of political favouritism. All prosecuting as well as Crown attorneys have been given in silk as they are really the "King's Counsel."

The list is as follows: Edmonton—Alexander Stuart, Frank Ford, Alexander Grant MacKay, Sydney B. Woods, Elihu Burritt Edwards, Harold Hayward Pardee, Oliver Mowar Biggar, George B. O'Connor, Wilfrid Gariepy, Camby Foster Newell, James Enderly Walbridge, Albert Freeman Ewing, Charles Arnold Grant, Alexander Cameron Rutherford.

Calgary—Clifford P. Jones, Stanley L. Jones, George H. Ross, Alfred Henry Clark, Thomas Mitchell, Mark Tweedie, Maitland S. McCarthy.

Macleod—Edward P. McNeill, William M. Campbell.

Lethbridge—Luther Martin Johnson.

Medicine Hat—William A. Begg.

Mauville—Arthur Wellington Ebett.

Announcement has just been made of several changes in Alberta Judgeships. Two Judges are moved and two new appointments are made: Judge Crawford, of Macleod, goes to Edmonton as Junior Judge of the district and is succeeded at Macleod by Edward P. McNeill, of Macleod. Judge Winter, of Lethbridge, is moved to Calgary as Junior Judge of that district. John A. Jackson, of Ponoka, is appointed Judge at Lethbridge.

Mr. W. J. Baird, who has been a partner in the legal firm of Taylor, Harvey, Baird, Grant, and Stockton, and last year was president of the Central Conservative Association, Vancouver, is opening an office under his own name in the Winch Building, Vancouver.

Mr. H. F. Hill, Ottawa, will likely succeed Mr. D. M. McIntyre as trustee of the Strathcona Trust in Canada. This trust is maintained by Lord Strathcona for the purpose of promoting military drill in Canada, and the appointment has been made necessary by Mr. McIntyre's acceptance of the chairmanship of the Ontario Railway and Municipal Board.

A. R. Wardell, K.C., the oldest practising lawyer in Wentworth county, died at his home on the Governor's road a few days ago. Though it was known by many that Mr. Wardell, who was taken ill very suddenly, was suffering from uremic poisoning, the news of his death came as a great shock to the many friends of the deceased. The sympathy of the entire community is extended to the surviving members of his family, particularly since Mrs. Wardell, who has been confined to her room for nearly a year, is as yet very ill. Mr. Wardell was the son of the late Richard Wardell, and was born in the residence on the Governor's road in 1836. When quite young he was sent to France, where he received his education. Later he went to England, coming back to Canada. When about 18 or 20 years of age he entered the law office of Notman & Barton, and later was associated with the late Thomas Robertson, afterwards Judge of the High Court. Mr. Wardell later entered into partnership with William Wylde, and for many years the firm of Wardell & Wylde practised law where Mr. Wardell's office now is in the Bank of Hamilton building. Mr. Wylde left Dundas some 25 years ago, and Mr. Wardell's eldest son, the late T. A. Wardell, M.L.A., became his next partner. The deceased had conducted the law office ever since, and his regularity in attending to business was frequently commented upon. Mr. Wardell was in his seventy-eighth year, and for fifty years he had practised law.

The late Mr. Wardell was also one of the oldest military officers in this vicinity. In 1866 he was captain of the Dundas Infantry Company, the only organization of military

men here at that time, and when called out at the Fenian Raid they were attached to the Brant County Battalion. Many of the Veterans of '66 knew the deceased well, he having always been called upon to make out the necessary papers and credentials to entitle them to the land grant, etc.

In politics Mr. Wardell was a Conservative, and in 1891 contested North Wentworth in the interests of that party in a Dominion contest. In 1902, after the death of his son and partner, the late T. A. Wardell, he was again chosen the standard-bearer for the Conservative party and contested a seat in the Legislature. On both occasions he was defeated by small majorities.

Prior to this Mr. Wardell was Mayor of Dundas for about ten years; reeve, with a seat at the county council, and also warden of the county for a term. For the past ten years he had not taken any active part in politics, but confined his energies strictly to his large law practice. The surviving members of the family, besides a widow, are: One daughter, Mrs. George H. Quine, of New York, and three sons, Dr. Harry Wardell, Hamilton; Sydenham, at home, and Lindsay A., architect, Hamilton.

Deceased had been married twice, his first wife, Miss Maria Atkins, daughter of the late Thomas Atkins, Governor's road, having predeceased him 35 years. He was later wedded to a Miss Smith, who survives. Mr. Wardell was a member of the A.O.U.W. Dundas lodge.

The funeral services were held at St. Augustine's Church, thence to St. Augustine's Cemetery.

Isidore Noel Belleau, K.C., of Sorel, has been elevated to the Superior Court Bench of the Province of Quebec in succession to Justice Pelletier, who has been retired.

Our subject is senior member of the well-known legal firm of Belleau, Belleau & Belleau, of Quebec. The new Judge was born at Deschambeault, in the county of Portneuf, and was educated at the Quebec Seminary and Laval University, where he made a distinguished course and carried off premier honors. He practised at Levis and later in the ancient capital in partnership with his brother and his son.

He is a man of marked literary taste and he is the founder of the *Levis Echo*, which he edited for some time with ability. He was also for a while a member of the editorial staff of *Le Moniteur*, and he was mayor of Levis for a term, reor-

ganizing the finances of that town. He is a Doctor of Laws and for a number of years has been solicitor for the Credit Foncier, of Québec. He is a distinguished orator, and from 1878 to 1885 was one of the most redoubtable political campaigners in the Quebec district and has been at various times candidate at Port Neuf, Levis, and Bellechase. He was elected for Levis in 1885 and sat in the House of Commons for two sessions. Since that date he has devoted himself exclusively to his profession, and has been a Queen's Counsellor since 1887. He is one of the most prominent members of the Quebec Bar and very popular with his confreres, and his appointment to the Superior Court Bench has been well received throughout Quebec Province.

The whole profession has learned with sincere pleasure that Lord Alverstone is recovering from the illness that has prevented him from attending the Courts during the past few weeks. It is nearly thirteen years since Lord Alverstone, after an unprecedentedly long period of service as Attorney-General, began his career on the Bench. Not only have his judicial qualities enabled him to worthily maintain the great traditions of the highest permanent legal office in the country—on the Bench, as at the Bar, his personal qualities have won for him in a special degree the cordial regard of the members of both branches of the profession. It is unlikely that Lord Alverstone will be able to return to the Courts during the present sittings, but it will be universally hoped that, having completely regained his strength, he will resume the performance of his judicial duties at the beginning of next term.

PRIVY COUNCIL DECISIONS.

WILSON v. CORPORATION OF DELTA.

ON APPEAL FROM THE COURT OF APPEAL OF BRITISH
COLUMBIA.

Law of British Columbia—Validity of By-law—Municipal Act, 1892 (55 Vict. ch. 33), sec. 146—Limitation of Actions against Municipality—Municipal Clauses Act, 1897 (61 Vict. ch. 144), secs. 243, 244.

Section 146 of the Municipal Act 1892, of British Columbia provides that: "When debentures have been issued under a statute or under a by-law, and the interest on such debentures . . . has been paid for the period of one year or more by the municipality, the statute and the by-law and the debentures issued thereunder . . . shall be valid and binding on the corporation, and shall not be quashed or set aside on any ground whatever."

Held, that the effect of the section was not limited to the validating of the debentures issued under a by-law, but that the by-law itself could not be set aside after the lapse of a year on the ground of irregularity in the procedure by which it was obtained.

By sec. 243 of the Municipal Clauses Act 1897, "all actions against any municipality . . . for the unlawful doing of anything purporting to have been done . . . under powers conferred by any Act of the Legislature . . . shall be commenced within six months after the cause of such action shall have first arisen," and by sec. 244, "all actions against a municipality other than those mentioned in the last preceding section shall be commenced within one year after the cause of such action shall have arisen."

Held, that the sections applied to an action brought for continuing damage alleged to have been caused to land of the appellant by a dyke and works erected and maintained by the respondent municipality, and for an injunction.

Judgment of the Court below affirmed.

MANITOBA.

Sale of Land — Option of Purchasing — Construction of Agreement Whether of Agency or as Principal—Commission.

The appellants, by an agreement in writing, agreed to give to the respondents the option of purchasing certain land at the price and on the terms set out in the agreement. The agreement contained this clause: "We hereby agree to pay one thousand dollars commission to the respondents on sale of above described property on above described terms."

Held, that an option of buying having been given to the respondents in plain, unequivocal terms, the subsequent clause as to commission was not so necessarily inconsistent with it as to convert the agreement into a contract of agency under which the respondents, being agents, had no right to purchase as principals.

Judgment of the Court below affirmed.

Livingstone v. Ross (85 L. T. Rep. 382; (1901) A. C. 327), distinguished.

Mines and Minerals—Natural Gas.

The decision of the Privy Council in *Barnard-Argue-Roth-Stearns Oil Company and others v. Farquharson* (107 L. T. Rep. 332), adds one more to the numerous and conflicting cases as to the meaning of "mines and minerals." That was an appeal from the Court of Appeal for Ontario. The facts were shortly as follows: The appellants sold to the respondents' predecessor in title certain land, "excepting and reserving to the said company, their successors, and assigns all mines and quarries of metals and minerals and all springs of oil under the said land whether already discovered or not, with liberty . . . to search for, work, win, and carry away the same." And it was held that the reservation did not include natural gas with which certain strata underlying the land were impregnated, such gas, though found with the oil, being at the time of the sale considered as a dangerous element to be got rid of, though it had since

become of considerable commercial value. It was conceded in the judgment delivered by Lord Atkinson that in one sense natural gas is a mineral in that it is neither an animal nor a vegetable product, and all substances to be found on, in, or under the earth must be included in one or other of the three categories of animal, vegetable, or mineral substance. But, as Lord Watson said in *Lord Provost of Glasgow v. Fairlie* (60 L. T. Rep. 274; 13 App. Cas. 657), "the words 'mines' and 'minerals' are not definite terms; they are susceptible of limitation or expansion according to the intention with which they are used." The natural gas case is an interesting one, but, as it turned upon the language of the exception and all the circumstances of the case, like many other of the decisions on the meaning of the words "mines" and "minerals," it will not necessarily control future decisions. The Judge of first instance in that case referred to the important decision of the House of Lords in *North British Railway Company v. Budhill Coal and Sandstone Company and others* (101 L. T. Rep. 609; (1910), A. C. 116), which overruled numerous previous decisions. It was there held, upon an appeal from Scotland, that conveyances which either by reference to the Railways Clauses Consolidation (Scotland) Act 1845 (which corresponds with sec. 77 of the Railways Clauses Consolidation (England) Act 1845), or in terms, excepted the mines and minerals, did not except sandstone, which was not a mineral within the meaning of the section. That case contains a very useful summary by Lord Loreburn of some of the principal previous authorities.

SUPREME COURT OF CANADA.

IN RE WEST LORNE SCRUTINY.

ONT.]

[FEBRUARY 18TH, 1913.]

*Election Law—Vote on Municipal By-law — Scrutiny—
Powers of Judge—Inquiry into Qualification of Voter—
Disposition of Rejected Ballots—Ontario Municipal Act,
1903, secs. 369 et seq.—Voters' Lists Act, 1907, sec. 24.*

A County Court Judge holding a scrutiny of the ballot papers deposited in a vote on a municipal by-law may go behind the voters' list and inquire if a tenant whose name is placed thereon has the residential qualification entitling him to vote. DAVIES and BRODEUR, JJ., dissenting.

The Judge has no power to inquire whether rejected ballots were cast for or against the by-law.

Ballots rejected on a scrutiny must be deducted from the total number of votes cast in favour of the by-law.

The Supreme Court affirmed the decision of the Court of Appeal (26 Ont. L. R. 339), reversing the judgment of a Divisional Court (25 Ont. L. R. 267), which reversed the decision at the hearing (23 Ont. L. R. 598.)

BOULTER v. STOCKS.

*Contract—Rescission—Sale of Land—Misrepresentations—
Affirmance.*

B. advertised for sale his farm in Ontario, stating the contents and describing it as in first-class condition. He also stated the number of trees, old and new, in the orchard on it. S., then in British Columbia, was shewn the advertisement and, after some correspondence, in which B. reiterated the statements therein, came to Ontario and spent some time in inspecting the farm, which he finally purchased on B.'s terms and entered into possession. Shortly after he leased the orchard for ten years and within a day or two discovered that the farm contained over forty acres less than, and the contents of the orchard only half of, what had been

represented; also that the farm was not in the condition stated, but badly overrun with noxious weeds. He therefore procured the cancellation of the lease of the orchard and brought action to have the sale rescinded.

Held, that the lease of the orchard was not, under the circumstances, an affirmance of the contract for sale which would disentitle S. to rescission; that if it were an affirmance as to the orchard the subsequent discovery of the other misrepresentations would entitle him to a decree. *Campbell v. Fleming* (1 A. & E. 40), distinguished.

Appeal dismissed with costs.

GRAVES v. THE KING.

Criminal Law—Indictment for Murder—Trial—Charge to Jury—Non-direction—New Trial.

On the trial of an indictment for murder of one Kenneth Lea, it was proved that the prisoners, who had been drinking, came on the deceased's lawn and commenced to shout and sing and use profane and insulting language towards him. He twice warned them away and finally appeared with a loaded gun threatening to shoot. A rush was made towards the verandah where he stood when he took hold of the barrel of the gun and struck one of the prisoners with the stock. The gun was discharged into his body and there was evidence that the prisoners then maltreated him and his wife. He was taken to a Hospital in Halifax, where he died shortly after. The trial Judge in charging the jury, instructed them that the prisoners were doing an unlawful act in trespassing on the property of deceased and that if they were actuated by malice it would be murder, if not, it was manslaughter, drawing their attention specially to sections 256 and 259(b) of the Criminal Code. The prisoners were found guilty of murder. On appeal from the decision of the Supreme Court of Nova Scotia on a reserve case:—

Held, that the Judge should have drawn the attention of the jury to sub-section (d) of section 259 and directed them to find whether or not the prisoners knew, or ought to have

known, that their acts were likely to cause death and his failure to do so was non-direction for which the prisoners were entitled to a new trial.

Appeal allowed with costs.

CITY OF MONTREAL v. LAYTON.

Public Health—Suspected Food for Sale—Action by Health Officers—Control by Court—Evidence—Injunction.

In December, 1910, the appellant company had a large quantity of eggs, frozen in bulk, stored in the warehouse of a cold storage company, the *mis-en-cause* in the action. On December 19th a food inspector of the city of Montreal entered the warehouse and removed four cans of the eggs, and on the 25th notified the Cold Storage Company that the whole lot was under seizure until a report was obtained on the samples so taken. On January 24th, 1911, the Chief Food Inspector of the city notified the Cold Storage Company that they must consider the eggs as still under seizure and not allow any of them to be removed or sold, and on the next day he instructed them to comply with an order of the Provincial Board of Health that the eggs were not to be sold anywhere in the province. On the 26th the respondents were notified that if the eggs were not removed from the province they would immediately be destroyed. The respondent company then brought action to restrain the city from further interference with their property, and a temporary injunction was issued which was enlarged from time to time until the action was decided when it was made permanent, the trial Judge holding that the eggs were fit for human consumption, and the city's proceedings were illegal. His judgment was affirmed by the Court of King's Bench on the ground that there had been no lawful seizure of the eggs and the injunction restrained the city from seizing or interfering with them otherwise than by due process of law. On appeal to the Supreme Court of Canada:—

Held, that the finding of the trial Judge that the eggs were fit for human consumption should not be disturbed.

Held, per FITZPATRICK, C.J., DAVIES, and IDINGTON, JJ., that the action of the health officers in exercising the authority conferred on them by law are not final but are subject to control by the Superior Court.

Held, per FITZPATRICK, C.J., that there was no lawful seizure of the respondents' eggs.

Held, per ANGLIN, and BRODEUR, JJ., that the Chief Food Inspector did not exercise his independent judgment in condemning the eggs, but merely followed out the instructions of civic officials and could not claim any protection under the Public Health Act.

NOVA SCOTIA CAR WORKS v. HALIFAX.

N.S.]

[FEBRUARY 18TH, 1913.]

Municipal Corporation—Exemption of Industry from Taxation—Special Assessment—Local Improvement.

By agreement with the city of Halifax, sanctioned by an Act of the Legislature, a company doing business in the city was granted for a certain period "a total exemption from taxation" except for water rates.

Held, reversing the judgment of the Supreme Court of Nova Scotia (45 N. S. Rep. 552), FITZPATRICK, C.J., dissenting, that a special assessment for a proportionate part of the cost of a public sewer, claimed to be chargeable against the lands of the company was "taxation" within the meaning of said agreement and the company was exempt from liability therefor.

PICKLES v. CHINA MUTUAL INS. CO.

N.S.]

[FEBRUARY 18TH, 1913.]

Marine Insurance—Mutual Company—Cancellation of Policy—Return of Unearned Premium—Cancellation by Operation of Law.

A mutual insurance company incorporated under the laws of the State of Massachusetts issued marine policies in favour of parties in Nova Scotia who gave notes for the premiums. The policies provided for a return of premiums "for every thirty days of unexpired time if this policy be

cancelled." Before any of the premium notes matured the policy-holders were notified that the company had been put into liquidation at the instance of the Insurance Commissioner, the notice stating that the legal effect was "to cancel all outstanding policies." In an action by the receiver in the company's name to enforce payment on the notes:—

Held, affirming the judgment appealed against (46 N. S. Rep. 7), that the decision of the case must be governed by the law of Massachusetts; that the holder of the policy in a mutual company being both insurer and insured, the notes sued on were assets for distribution among the creditors; and the receiver was, therefore, entitled to recover the full amount.

Held also, that a cancellation resulting from the action of the State was not a cancellation within the meaning of the above clause providing for return of premium.

CANADA FOUNDRY CO. v. BUCYRUS.

ONT.]

[FEBRUARY 18TH, 1913.]

Trade-mark—Geographical Name—Right to Register—Interference with use.

A company in the United States engaged in the manufacture of certain articles for use on railways, adopted the word "Bucyrus," the name of a town in Ohio, as a mark to distinguish such goods from those manufactured by others, and sold them for many years in the United States and Canada under that designation.

Held, that the company was entitled to register the word "Bucyrus" as their trade-mark for use in connection with such goods.

For some years the Canada Foundry Co. was agent in Canada for selling the "Bucyrus" goods and built up a large business for their principals. After their agency terminated they applied the designation "Canadian Bucyrus" to similar goods of their own manufacture and eventually registered these words as a trade-mark for such goods.

Held, that such trade-mark should be expunged from the registry.

The judgment of the Exchequer Court (14 Ex. C. R. 35) was affirmed.

SUPREME COURT DECISION.

CROSS v. CARSTAIRS.
RE EDMONTON (PROVINCIAL) ELECTION.

ALTA.]

[FEBRUARY 21ST, 1913.]

*Appeal — Provincial Election — Preliminary Objections—
Judicial Proceedings—Final Judgment.*

Held, per DAVIES, IDINGTON and ANGLIN, JJ., that under the provisions of the Alberta Controverted Elections Act, the judgment of the Supreme Court of the province in proceedings to set aside an election to the Legislature is final and no appeal lies therefrom to the Supreme Court of Canada.

Held, per DUFF, J., that a proceeding under said Act to question the validity of an election is not a "judicial proceeding" within the meaning of sec. 2(e) of the Supreme Court Act.

Held, per BRODEUR, J., that the judgment of the Supreme Court of Alberta on appeal from the decision of a Judge on preliminary objections filed under the said Controverted Elections Act is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

SUPREME COURT OF ONTARIO.

APPELLATE DIVISION.

PIPER v. STEVENSON.

*Limitation of Actions—Possession of Land — Enclosure—
Cultivating and Cropping—Acts of Possession—Aban-
donment—Person Acquiring Title by Possession not Liv-
ing on Land During Winter Months—Entry of Owner—
Insufficiency—Establishment of Title by Possession.*

Appeal by the defendant from the judgment of MEREDITH, C.J.C.P., in favor of the plaintiff in an action for trespass to land.

The appeal was heard by MULOCK, C.J.Ex., CLUTE, RIDDELL, SUTHERLAND, and LEITCH, JJ.

E. D. Armour, K.C., for the defendant (appellant.)

Gillis, for the plaintiff (respondent.)

Appeal from R. W. MEREDITH, C.J.C.P.

The plaintiff claims as owner and occupier of lots 28 and 29, block "A" Marmot street, North Toronto, registered plan No. 722, and asks an injunction restraining the defendant from trespass, and for damages for former trespass and forcible entry. The defendant denies that the plaintiff is the owner of the lots in question and says that he purchased the same from the registered owner thereof, and thereupon entered into possession of the same and built a fence thereon and planted a crop, which are the trespasses complained of.

In March, 1901, plaintiff bargained for the adjoining block with one Whaley, and in May or June delivered to Whaley a buggy in part payment. In September the plaintiff enclosed the Whaley lots and the lots in question by a fence, but did not receive the deed of the Whaley lots until February 4th, 1902, when three of them were conveyed to the plaintiff, and July 4th, when the remaining three were conveyed to the plaintiff. In the fall, probably in October, after the fencing took place, the plaintiff had manure drawn upon the lands in question, and the evidence shews that they have been cultivated and cropped by the plaintiff ever since.

The plaintiff did not reside upon the land in question, nor upon the lots purchased from Whaley, until 1905 or 1906, but lived at a short distance therefrom, upon a rented farm, from which she could walk to the lot in about fifteen minutes, or drive in five minutes. The Whaley lots, and the lots in question, formed a block and were wholly enclosed from September, 1901, until action brought on the 21st June, 1912.

The learned trial Judge finds that the lands in question "were fenced in with her own as one lot" in September "and all the lots thus enclosed were together ploughed as one lot and during the following winter manure was drawn out and placed upon the land. Everything was done to it

that an owner intending to possess and cultivate it would have done. In the following spring it was cropped, and from that on it was cultivated until the crop was taken off, when fall ploughing and manuring were again done, and this has gone on continuously ever since. In the years 1905 and 1906 buildings were erected, and in the latter year the plaintiff went to live and has ever since lived there. Her possession has been all along open, obvious, exclusive, and continuous. Until 1906 everything was done upon the land that an owner not residing on it would do in reaping the full benefit of it, and since the spring of that year everything that an owner in actual, constant occupation would do. All this is well proved by the witnesses, Doughty, Whaley and Newman, as well as by the plaintiff and her husband.

I think this is a fair statement as a result of the evidence. The learned trial Judge then proceeds: "I cannot think that the logical result of the reasoning in any of the decided cases can be that there can be no possession which will ripen into a right to the land, unless the possessor also lives upon it, and if it were I would be quite unable to follow it to that extent in this case. Here, there was the plainest evidence of wrongful possession in the fencing in of the land in question as part and parcel of the plaintiff's land alone calling for action on the owner's part if he desired to save his rights,—action in removing the fences, or in the Courts of Justice; and in addition to that there was the continuous use by the plaintiff for her own benefit for upwards of ten years before any such action was taken, and so the rights of the owner became barred by the Statute."

It was strongly urged that what was done by or on behalf of the plaintiff in respect of fencing and occupation of the lots did not bring the case within the purview of the Statute so as to give her a title, because the work was done by her servant, and she did not personally reside upon the land until some five or six years after the property was fenced. He further urged that the deeds to the plaintiff of the adjoining lots not having been given until February, 1902, the possession of the adjoining lots was in the owner of them, and the lot in question could not be considered as enclosed with the plaintiff's until she received a deed, and that entry by the defendant, after he had received a paper

title, vested the property in him, the Statute not having run a sufficient length of time from the date of the deed of the adjoining lots to the plaintiff and the entry by the defendant.

The plain answer to that, I think, is this,—it is wholly immaterial whether the plaintiff had received a deed of the adjoining lots or not; she had bargained for them and fenced them in in September, 1901, and her possession of them and of the land in question was continuous and exclusive from the date of fencing.

As to the entry, such as it was, under the law as it now stands, could have no effect. Since the Act, sec. 8, no person shall be deemed to have been in possession of any land, within the meaning of the Act, merely by reason of having made an entry thereof. "Under the old law a merely formal entry by the person entitled was sufficient to vest the possession in him. Co. Li. Litt. 253b. Though under 4 and 5 Anne ch. 16, sec. 16, such an entry or claim was not effectual to avoid the Statute 21 Jac. 1, ch. 16, unless an action was commenced within a year and prosecuted with effect. The result is that an entry, to vest the possession in a person entering and prevent the bar of the Statute, must be effective as opposed to merely formal. 'The making an entry amounts to nothing unless something is done to divest the possession out of the tenant and revest it in fact in the lord.' *Doe v. Coombs* (1850), 9 C. B. p. 718. And it must be made *animo possidendi*: *Solling v. Broughton* (1893).

(Reference to Co. Litt. 253b; 4 & 5 Anne ch. 16, sec. 16; 21 Jac. 1. ch. 16; *Doe v. Coombes*, 9 C. B. 718; *Solling v. Broughton* (1893), A. C. 556; *Worssam v. Vandenbrande*, 17 W. R. 53.)

The present case differs from that quoted in several particulars. The land had been continuously used and occupied down to the present time by the plaintiff. The plaintiff was, in fact, residing upon the land at the time the alleged entry was made, that is, upon the block of which the lands in question form a part, being one enclosure for the whole.

Also, here the ten years had elapsed after the enclosure, and before the entry, and the entry was such as I think expressly falls within section 8 of the Act.

There remains, therefore, for consideration only the question as to whether or not a piece of land entirely enclosed with other lands by the plaintiff, used and occupied by her continuously for over ten years, her possession all along being "open, obvious, exclusive and continuous" does not come within the Statute, simply because in the earlier four or five years she did not live upon the land: that is, was personally absent during the winter, although the land remained still enclosed by the fence and was used and occupied as an owner would in such a case.

The authority chiefly relied on by counsel for the defendant was *Coffin v. North American Land Co.*, 21 O. R. 80. In several respects the facts in that case are similar to the facts in the present case, but in others they widely differ. In that case, during the statutory period the true owners entered upon the land, pulled down the old and built a new fence. Here, as already pointed out, entry was not made until after ten years had elapsed from the time the lots were enclosed in September, 1901. Further, the plaintiff in the *Coffin Case* entered into an agreement after a threat that he would be evicted unless he acknowledged himself to be a tenant and promised to give up possession when required, and he did give up possession and although living on the adjoining land, he made no claim of any kind until five years after he had given up possession.

The points of difference are sufficient, I think, to distinguish the *Coffin Case* from the present. But I desire to refer to some observations made in the judgment of the *Coffin Case* to which I cannot accede. It is said there that "The plaintiff cropped the land in question during the summer. During the winter he did nothing to it but draw some loads of manure upon it. . . . During the summer months and during the months when he was sowing the land and reaping his crop, his possession was clearly sufficient beyond question, but during the rest of the year his possession was not actual nor constant, nor visible. During each winter he says that he drew some manure upon the place and in the spring he spread. Excepting for this he withdrew absolutely to his own lot, which adjoined but was separated by a fence from that of which he claims the possession," (differing in this respect also from the present) "The winter months must be separated from the summer and we must look at the acts of possession done during those

winter months by themselves. Doing this, I think the acts done in the winter did not constitute an occupation of the property to the exclusion of the right of a true owner, but were mere acts of trespass, covering necessarily but a very short portion of the winter, and that the possession must be taken to have been vacant for the remainder of it. The right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken in the spring again by the plaintiff;" citing *Agency Co. v. Short*, 13 App. Cas. 793.

To this proposition of law, I cannot assent. In the case cited, the trial Judge had charged the jury that when any person went into possession of another person's land and exercised dominion over it with the intention of claiming it, and the Statute of Limitations thereupon began to run as against the owner of the land, such running was never stopped, notwithstanding that the intruder entirely abandoned the land long before the expiration of twenty years from his first entry, and no other person took possession of such land, and that the right of the true owner of the land would not again arise without an entry by such true owner with the intention of repossessing himself of such land. The jury were also told that at the expiration of twenty years after such taking possession of the land as against the true owner, his right of action was defeated, notwithstanding that there may not have been twenty years' possession as against him.

Lord Macnaghten, who delivered the judgment of the Privy Council, after referring to the charge, and to the origin of the doctrine, said: "Their Lordships are unable to concur in this view. They are of opinion that if a person enters upon the land of another and holds possession for a time, and then, without having acquired title under the statute, abandons possession, the rightful owner, on the abandonment, is in the same position in all respects as he was before the intrusion took place. There is no one against whom he can bring an action. He cannot make an entry upon himself. There is no positive enactment, nor is there any principle of law which requires him to do any act, to issue any notice, or to perform any ceremony in order to rehabilitate himself. No new departure is necessary. The possession of the intruder, ineffectual for the

purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

This final statement of the law was applicable to the *Coffin Case*, on the finding that there was there an abandonment of the premises for some 4 or 5 years. In the present case there was no abandonment, unless as Street, J., argues "the fact that the land lay idle during the winter."

It is impossible, I think, to treat what took place in the present case as abandonment. The land was entirely enclosed. It was cultivated and cropped every year. It is begging the question to say, that because the land was not used in the winter time, when it could not be used for any useful purpose, therefore there was an abandonment. Surely abandonment is a matter of intention, and the cultivation and cropping from year to year shows that there never was any intention of abandonment, and the case cited with respect to that point had, I think, no application.

(Reference to *McIntyre v. Thompson*, 1 O. L. R. 160, 167; *Sedden v. Smith*, 35 L. T. R. 166; *Harris v. Mills*, 7 A. R. 414, 421; *Jackson ex dem. Hardenburg v. Bloomer*, 2 Johns (N. Y.), 256; *Worssam v. Vanderbrade*, 17 W. R. 53.)

The case of *Worssam v. Vanderbrade*, 17 W. R. 53, A. I think, in point. The Court on the finding of the jury regarded the fence as wholly destroyed, and declared in so many words if this had continued the title of the defendants would have been good. In the present case, not only did the fence continue, but the land was cultivated every year.

I cannot assent to the general statement of Street, J., in the *Coffin Case*, that the winter months must be separated from the summer months, and that we must look at the acts of possession during those months by themselves. But the view there expressed that the acts done in the winter months did not constitute an occupation of the property to the exclusion of the right of the true owner was certainly, and that the operation of the Statute of Limitations would cease until actual possession was taken in the following spring. No doubt, the statute ceases to run if the adverse possession of the land and leaves the possession vacant, as there is no

winter months by themselves. Doing this, I think the acts done in the winter did not constitute an occupation of the property to the exclusion of the right of a true owner, but were mere acts of trespass, covering necessarily but a very short portion of the winter, and that the possession must be taken to have been vacant for the remainder of it. The right of the true owner would attach upon each occasion when the possession became thus vacant, and the operation of the Statute of Limitations would cease until actual possession was taken in the spring again by the plaintiff;" citing *Agency Co. v. Short*, 13 App. Cas. 793.

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purpose of transferring title, ceases upon its abandonment to be effectual for any purpose. It does not leave behind it any cloud on the title of the rightful owner, or any secret process at work for the possible benefit in time to come of some casual interloper or lucky vagrant."

This final statement of the law was applicable to the *Coffin Case*, on the finding that there was there an abandonment of the premises for some 4 or 5 years. In the present case there was no abandonment, unless as Street, J., argues "the fact that the land lay idle during the winter."

It is impossible, I think, to treat what took place in the present case as abandonment. The land was entirely enclosed. It was cultivated and cropped every year. It is begging the question to say, that because the land was not used in the winter time, when it could not be used for any useful purpose, therefore, there was an abandonment. Surely abandonment is a matter of intention, and the cultivation and cropping from year to year shews that there never was any intention of abandonment, and the case cited with respect to that point had, I think, no application.

(Reference to *McIntyre v. Thompson*, 1 O. L. R. 163, 167; *Sedden v. Smith*, 36 L. T. R. 168; *Harris v. Mudie*, 7 A. R. 414, 421; *Jackson ex dem. Hardenbury v. Shoomaker*, 2 Johns (N. Y.), 230; *Worssam v. Vandenbrande*, 17 W. R. 53.)

The case of *Worssam v. Vandenbrande*, 17 W. R. 53, is, I think, in point. The Court on the finding of the jury regarded the fence as wholly destroyed, and declared in so many words if this had continued the title of the defendants would have been good. In the present case, not only, did the fence continue, but the land was cultivated each year.

I cannot assent to the general statement of Street, J., in the *Coffin Case*, that the winter months must be separated from the summer months, and that we must look at the acts of possession during those months by themselves, nor the view there expressed that the acts done in the winter months did not constitute an occupation of the property to the exclusion of the right of the true owner would attach, and that the operation of the Statute of Limitations would cease until actual possession was taken in the following spring. No doubt, the statute ceases to run if the adverse possessor quits the land and leaves the possession vacant, as there is no

person in whose favour it can run. *Lightwood's Time Limit on Actions*, 12.

But where the property is entirely enclosed by the person claiming by possession his mere absence does not, in my opinion, amount to abandonment or make the premises vacant. It may still be considered under his control, inasmuch as it excludes all others therefrom by his enclosure. If the owner himself claimed before the statute had barred him he could not reach his land without doing some act. He could not make an entry without at least breaking down, if not destroying, the fence. It is a notice to all the world that the property is claimed by someone, and that all others are excluded, and unless there is some act on the part of the true owner to create a new starting point and the intruder retains possession by the enclosure and uses and cultivates the land as his own, either by himself or his servants, although not actually present in person or by his servants during portions of the year, the owner is excluded and his title barred after the statutory period.

Aside from the authorities, it seems to me plain that in the present case the owner's right of action first accrued when the lands in question were enclosed thereby excluding him. "No person shall make an entry or distress, or bring any action to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action, first accrued to some person through whom he claims." Section 4, R. S. O. vol. 1. "Where the person claiming such land or rent, or some person through whom he claims, has, in respect of the estate or interest claimed, been in possession . . . and has . . . been dispossessed . . . then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession."

It seems to me impossible to say, without disregarding the fair meaning of the word, that an owner of land is not dispossessed when another has enclosed his property without leave or color of right, and uses it as his own. By sec. 15, at the end of the period of limitation the right of the party out of possession is extinguished. Here, I can not doubt upon the facts as found by the trial Judge fully supported by the evidence, that during the period required by the statute, the true owner was excluded from possession by the act of the plaintiff who never abandoned the premises out of the

contrary "her possession has been all along, open, obvious, exclusive, and continuous. Until 1906, everything was done upon the land that an owner not residing upon it would do in reaping the full benefit off it, and since the spring of that year everything that an owner in actual constant occupation would do."

This is sufficient under the Act, in my judgment, to exclude any right or title of the former owner.

(Reference to secs. 4 and 15 of the Real Property Limitations Act; Halsbury's Laws of England, vol. 19, p. 110; Sugden's Real Property Statutes, 2nd ed., p. 47; *Grant v. Ellis*, 9 M. & W. 113, 128.)

The judgment in the *Coffin Case* may be supported by the facts which I have pointed out; but in so far as it purports to be applicable to a case like the present, and to declare that the winter months must be separated from the summer months, and that we must look at the acts of possession done during those months, by themselves, I cannot agree. And to that extent, and in so far as it is inconsistent with the view herein expressed, that case is overruled.

The appeal is dismissed with costs.

MORRISON v. PERE MARQUETTE.

The plaintiff, who resided at Walkerville, on the line of the defendants' railway system, bought a return ticket from Walkerville to Marshfield (a stopping place on the defendant company's railway), and proceeded to Marshfield, intending to return by the evening train, which was due at Marshfield shortly before nine o'clock in the evening.

There had been a station-building at Marshfield, but it had been burnt down a couple of years before, and not rebuilt; but the point continued as an established stopping-place on the line of railway.

The plaintiff arrived there to take the return train shortly before it was due, but the train was late—how late was not made known.

There was no place of shelter to which the plaintiff could go in order to await the arrival of the train, and accordingly he was obliged to remain at the stopping place in question, and being thus exposed to the weather for a considerable length of time, he contracted an illness caused by the omission of the defendant company to establish a proper building.

It was argued before us that the plaintiff's claim for damages was too remote, and reliance was placed upon claims for damages of that nature arising from breach of contract.

But the cause of action here is a statutory one. Section 284 of the "Railway Act" declares that "the company shall furnish at the place of starting, and at the junction of the railway with other railways, and at all stopping places established for such purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage upon the railway." And sub-sec. 7, of that section, declares that "Every person aggrieved by any neglect or refusal of the company to comply with the requirements of this section shall, subject to this Act, have an action therefor against the company, from which action the company shall not be relieved by any notice, condition or declaration, if the damage arises from any negligence or omission of the company or of its servant."

Here it was shewn that the company had failed to supply "adequate and suitable accommodation" at Marshfield, the stopping place in question, whereby the plaintiff was exposed to the weather, and contracted the illness complained of.

There was evidence, which could not have been withdrawn from the jury, that the plaintiff's illness was occasioned by the defendant company's failure to observe the provisions of the section in question; and we agree with the view of the Divisional Court, and of the learned trial Judge, that the plaintiff's cause of action being a statutory one he is entitled to maintain this action in respect of the injury occasioned to him by the defendant company's failure to discharge its statutory duty.

We, therefore, think this appeal should be dismissed with costs.

MARITIME DOMINION.

A PAPER READ BEFORE THE INTERNATIONAL LAW ASSOCIATION AT ITS LAST MEETING.

When one considers the greatness and the grandeur of the ocean, it seems presumptuous to talk about the dominion of man over it. In a limited sense, however, the ocean is subject to us. The watery wastes of the world are a highway among the nations for all purposes, whether of war or peace, and the fish furnish food. The ocean is, in the full sense of the word, international. It is between the nations. Surely nowhere more than upon the sea there is scope for international agreement. It is sometimes said that the sea joins instead of divides the nations. Only in a very limited sense has that condition of things been realized. We find in history that the maritime policy of many States has been short-sighted, exclusive, and narrow. It is not well that this be so. The tendency now is toward a broader and better point of view. My object is to help, however slightly, towards a recognition of the fact that the best interests of all can be served by international agreement. I go even further, and say that in modern conditions, if we would avoid retrogression, we must have international agreement.

The supreme position attained by maritime States was recognized by Ruskin when he wrote: "Since first the dominion of men was asserted over the ocean, three thrones, of mark beyond all others, have been set upon its sands: the thrones of Tyre, Venice, and England."

At least one other nation owed its greatness to the sea. The national power and wealth of the Dutch depended on their shipping trade, which in turn could scarcely have attained its importance apart from its fisheries. Between the Dutch and the English long existed keen rivalry, and many of the principles which have come to be recognized as applying to the question of jurisdiction over the sea took shape during the struggles and disputes between these two nations.

In the sixteenth century, nations first began to have world-wide interests. It was a time of expansion in every way. There was a new birth of knowledge derived from the

study of ancient writers. Another line of enquiry led to the displacement of the old idea that the world was the centre of the universe. It was realized that it moved. Discovery was also made of the great oceans and continents hitherto unknown to the inhabitants of Europe. Men found themselves in a wider world.

Some of the nations, for example, Denmark and Venice, had asserted certain rights over parts of the narrow seas. In the new state of things Spain and Portugal claimed exclusive sovereign rights over the great oceans. England, under monarchs of the Tudor line, made a stand for the freedom of the seas. Each nation adopted a policy calculated to serve its own interests, and abandoned that policy for another if circumstances changed. Thus, under the Stuart kings, who wore the crowns of both England and Scotland, claims were made to sovereignty over all the coastal seas around the British Islands, and to a vague dominion beyond. The right was claimed not only of compelling homage to the flag of England, but also of excluding foreigners from fishing in seas considered British.

The Dutch contested the pretensions of Spain and Portugal, and also the claims put forward by England to the sovereignty of the seas. Commercial rivalry between the Dutch and the English led not only to endless disputes and negotiations, but to several wars. These controversies have recently been admirably described in Mr. T. W. Fulton's book on "The Sovereignty of the Sea," ("The Sovereignty of the Sea," by T. W. Fulton: W. Blackwood & Sons, Edinburgh and London, 1911), a most comprehensive work, to which I am indebted for much information. Mr. Fulton points out that the birth of modern international law was associated with the controversies as to the freedom of the sea. "It was," he says, "the appearance of 'Mare Liberum,' in 1609, that heralded the dawn of the new epoch. The little book of Grotius was at once a reasoned appeal for the freedom of the seas in the general interest of mankind, and the source from which the principles of the law of nations have come." ("The Sovereignty of the Sea," page 338.)

The English reply to the Dutch was the publication of Selden's "Mare Clausum," asserting the right of the Crown of England to the dominion of the British seas.

Mr. Fulton has brought together in his book the various historical events which have occurred in relation to the ques-

tion of maritime jurisdiction, more particularly during the last three centuries. I do not propose to refer in detail to these events which have led up to the present day position, but I wish to call attention to a few leading points.

Even Grotius, in presenting the argument for the freedom of the seas, admitted that a State is entitled to dominion over so much of the sea adjoining it as lies within the range of compulsion exercised from the land.

It remained for another Dutchman, Bynkershoek, to state how this principle should be carried into practice.

Nearly a century after Grotius, Byndershoek crystallized the position in the words, "*terra dominion finitur ubi finitur armorum vis.*" The dominion of the land ends where ends the power of arms. Having regard to the range of cannon, this distance was usually recognized as being about three miles. Thus, what is commonly called the three-mile limit became established. This distance has sometimes been treated as a fixed legal limit, regardless of the fact that in more modern times the application of the principle on which it was based would cause it to be greatly extended. On the other hand, the three-mile limit has been referred to almost with contempt as no more than an Anglo-American doctrine, which never has been incorporated into international European law. (Sir Arthur Bignold, in House of Commons, 20th April, 1909.)

The truth is that the question of maritime jurisdiction must be regarded in two quite separate aspects. In war, and in peace.

In warlike circumstances the doctrine of the power of arms necessarily applies, and, with greater power, a greater distance must be allowed to lie within the limit of territorial sea.

The peaceful aspect of the subject involves entirely different considerations arising in connection with the fisheries and other matters. As to fisheries, Welwood, a Scottish lawyer, who wrote in reply to Grotius before Seldon's book was published, was the first who clearly laid down "the principle that the inhabitants of a country had a primary and exclusive right to the fisheries along their coasts—that the usufruct of the adjacent sea belonged to them; and that one of the main reasons why that portion of the sea should pertain to the neighbouring State was the risk

of the exhaustion of its fisheries from promiscuous use. ("The Sovereignty of the Sea," page 355.)

In relation to the fisheries the three-mile limit is regarded internationally as the ordinary limit, but it is far from being universally accepted. Great Britain, while adopting the three-mile limit for particular purposes, has been careful to guard against this being taken as an admission that national rights may not extend further. Spain and Portugal, and also the Scandinavian countries, expressly claim a more extended boundary, and there are many other instances to the like effect. Regarding the other side of the Atlantic, Mr. Fulton points out that "although the United States more than any other power has varied her principles and claims as to the extent of territorial waters, according to her policy at the time—now claiming the vague and wandering 'boundary' of the Gulf Stream or the whole of the Behring Sea, and now the liberty to fish right up to the shores of the Falkland Islands—she has been consistent in this, that she has steadily and consistently pressed for the narrowest limits she could get in favour of her own fishermen on the coasts of the British North American colonies." ("The Sovereignty of the Sea," page 650).

The modern practice of different States varies so much that it is almost impossible to find any common basis. Not only is the width of the band of territorial waters not the same, but there are also differences in the method of measuring from the coast, and differences in the rules applied to bays and inlets. The jurisdiction over some inlets of the sea depends upon long continued custom, independent of any rules whatever, and in other instances the matter is complicated by the special provisions of treaties and conventions.

The key to the position is perhaps to be found in the fact that each nation has continued to regard the matter from a merely national standpoint, putting its own interests first, and the interests of others nowhere. It has scarcely been realized as yet that fisheries have become international, and that the narrow national standpoint will no longer serve in regard to questions of maritime dominion. It is necessary for us to use pause. We must recognize that in recent years conditions have completely changed, and that the whole question now demands consideration along far more com-

prehensile lines than hitherto. I am not overlooking the fact that certain international steps have been taken. Various international conventions have been entered into, and I would not in any way minimize the importance of the commencement which has been made towards a recognition of the necessity of common action for the common good. The North Sea Convention is important in this sense, but since it was signed in 1882, great changes have occurred. More effective methods have been devised for sweeping the seas with great trawl nets. The newer methods of fishing are much more destructive and wasteful and require to be regulated in order to prevent the impoverishment of the fisheries. Nowadays, regulations are ineffective unless international. The restraint imposed by regulations has not been sufficient. The older fishing areas have become more or less depleted, and trawlers have sought other regions where the same destructive processes are being repeated. The coasts of Iceland, Spain, Portugal, and Morocco are now much frequented by trawlers. The demand for the regulation of trawling formerly urged has been abandoned. Before the newer fishing grounds were discovered those interested in trawling were moved by self-interest to try and bring into operation some means of saving the fisheries from exhaustion. Since the vast extent of new fishing grounds has been known, the tendency has been to cry out for freedom, and to oppose the recognition of anything more than the narrowest limit of territorial sea, lest the harvest of the trawlers should be lessened. British trawlers predominate, but the industry is not the monopoly of any nation. It is international in every sense and a true estimate of the situation shews that the present absence of restraint will work out ultimately to the general disadvantage. I come to the point which I wish chiefly to emphasize, that, in the interest of everyone, a certain measure of restraint must be enforced, and that in present circumstances the only effective method of control is through the medium of universal international agreement.

It is apparent that the actual course of events is to a large extent governed by the influence of vested interests. There are the interests of in-shore fishermen and others, whose fishing is spoiled by the operation of trawlers, and there are the interests of the trawling industry itself. The two sometimes conflict. Over and above these, each State

had a general national interest, and here again the interests of the different nations sometimes conflict. In present circumstances it is almost inevitable that each interest should work for itself. It is difficult, though not impossible, for one State to lift the subject to a higher plane. It is none the less necessary that it should be so treated, and that it should be regarded in a broader and more far-seeing way. All the nations are interested in the maintenance of the supply of fish in the seas, and none can afford to allow fishing to be carried on anywhere in a manner tending towards the exhaustion of the supply. I mean that in modern economic conditions an injury done to the commercial prosperity of any particular region may involve ultimate consequences of a world-wide character. It is essential that an international understanding, more comprehensive and enduring than any yet achieved, should be brought about. Existing rights must, of course, be respected, but no partial interests should stand in the way of what will ultimately be best.

Until we arrive at the state of things approximating in some measure to what I have attempted to indicate, difficult international questions will continue to arise. Such questions have arisen in recent years. I give some examples. One relates to the coast of Scotland. Some problems relating to trawling and territorial limits in the Moray Firth were thoughtfully and learnedly dealt with in a paper on "Territorial Jurisdiction in Wide Bays," by Mr. A. H. Charteris, of Glasgow, which was read at the Berlin Conference of this Association in 1906. Since then there have been various developments in connection with that particular question, including the passing by the British Parliament of the Trawling in Prohibited Areas Prevention Act, 1909, which, however, leaves the problems still unsolved. Until the autumn of 1910 the century old dispute between Great Britain and the United States regarding the fisheries of Newfoundland and Canada remained outstanding. The right to fish in bays was in question in this instance, also, and as far as the particular localities were concerned was settled by the decision of the Hague Tribunal. There have been questions in recent years as to the invasion of the territorial limits of Spain and Portugal by trawlers from other countries, and during last year an international question of

a similar kind arose with Russia in relation to the White Sea.

It is generally recognized that the present position of affairs is unsatisfactory, and various efforts have been made to discover some acceptable solution. A series of articles containing proposed provisions regarding territorial waters was adopted at the London Conference of this Association in 1905. These articles were the subject of a very suggestive paper by Dr. Darday at the Budapest Conference of the Association in 1908. It seems very desirable that some common basis of this kind should be settled. It is clear both from everyday practice and from the opinions of representatives of practically all nations that a more extended territorial limit than three miles should be fixed in regard to fisheries, and also in regard to certain other matters of administration in time of peace. I am not concerned now to discuss the proposed limit of six miles, but rather to urge the desirability of international agreements which, in addition to fixing suitable territorial limits, should contain provisions enabling fishing to be placed under appropriate regulations in all regions where the enforcement of some restraint may be to the general advantage.

Such regulations must rest on the results of scientific inquiry. That alone will afford a sure and satisfactory basis for international agreement. It is therefore important to refer to what is being done in that direction. In addition to investigations conducted by various States, there is in existence the International Council for the Exploration of the Sea, which was the outcome of international conferences held at Stockholm in 1898 and Christiania in 1901. A great deal of valuable research work has been done, but a committee appointed by the British Government to enquire into the scientific and statistical investigations being carried on in relation to the fishing industry, reported in 1908 that the work achieved by the several agencies had "suffered greatly from diversity of aim and lack of co-ordination." (Report of Committee on Fishery Investigations, 1908 (Cd. 4268), page xiv.). The report of this committee also referred to a number of recent enquiries and reports by Parliamentary Select Committees dealing with the increasing intensity of fishing. These reports shew that the subject of the diminution of the fish supply is very pressing, and that the situation is going from bad to worse, and urge that no effort should be spared

to arrange for international treatment of the subject generally.

The British attitude was indicated by the Foreign Minister (Sir Edward Grey), in a speech in Parliament in July, 1908. After referring to the investigations in progress, he said that it would be known in a reasonable time whether or not the Government thought they had a case for approaching other powers, and, if so, what were the grounds and propositions they should ask those powers to agree to. More recently—indeed, little more than a year ago—Lord Morley stated in Parliament that the investigations of the International Council for the Exploration of the Seas were not completed. He pointed out the broad and important interests involved, and said that before the British Government could agree to an International Convention providing for control of the fisheries and spawning grounds beyond the three-mile limit, the investigations must be brought, if not to a close, at all events to a further stage than had then been reached. At the same time a similar statement was made by Sir Edward Grey. There the matter remains. If, as suggested in the report from a committee in 1908, which has already been quoted from, the various existing agencies, international and other, are not adequate, then steps should be taken to improve them. When an international conference was held in 1901 at Christiania, the instructions to the British delegates pointed out that the consideration of the subject would not admit of any delay, and the delegates were to urge the importance of entering at once upon the pursuit of investigations calculated to lead to an international agreement. In these circumstances one would have supposed that now, after the lapse of eleven years, we ought to be able to say that the investigation of the facts has been carried far enough, and that opinion has developed sufficiently to allow of definite steps being taken. Has not the time come when an international conference, constituted on the widest possible basis, should be convened to consider the subject of fishery regulation, along with the settlement of general principles to govern the international aspect of the whole question of maritime dominion?

M. SANFORD D. COLE.

Bristol, England.

CRIMINAL LAW AMENDMENT ACT, 1912.

The Criminal Law Amendment Act which has created so much discussion in Great Britain and France, is here published in full.—Ed.

The following circular has been issued by the Home Office:—

I am directed by the Secretary of State to transmit to you herewith, for the information of the justices of your Bench, a copy of the Criminal Law Amendment Act, 1912, which received the Royal Assent on Friday last, the 13th December, and came at once into operation.

The Act amends the Criminal Law Amendment Act, 1885, and the Vagrancy Act, 1898, in important particulars relating to the offences of procuration, the suppression of brothels, the offence of living on the earnings of prostitution, and the offence of solicitation for immoral purposes by male persons. Its chief provisions are aimed at those persons who as their profession or means of livelihood live on the prostitution or vice of others.

The only section of the Act which appears to the Secretary of State to require any detailed explanation is section 7. The object of this section was to strengthen and extend the provisions of the Vagrancy Act, 1898, but, owing to successive amendments in the House of Commons and in the House of Lords, and owing also to the necessity of dealing in one clause with the law of Scotland, and of Ireland, as well as with the English law, its provisions are somewhat complicated. It appears therefore to be desirable to set out its effect in the form which the Vagrancy Act, 1898, would assume if it were re-enacted with the amendments which have now been made.

The following is, the Secretary of State is advised, a correct statement of the law as it affects England and Wales, though he need not say that, if any doubtful point of construction should arise, it can be authoritatively determined only by a Court of law.

(1) Every male person who—

- (a) knowingly lives wholly or in part on the earnings of prostitution; or
- (b) in any public place persistently solicits or importunes for immoral purposes.

shall be deemed a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly. [1898, section 1 (1).]

(2) Where a male person is proved to live with or to be habitually in the company of a prostitute, or is proved to have exercised control, direction or influence over the movements of a prostitute in such a manner as to show that he is aiding, abetting, or compelling her prostitution with any other person, or generally, he shall, unless he can satisfy the Court to the contrary, be deemed to be knowingly living on the earnings of prostitution. [1898, section 1 (3) amended by 1912, section 7 (1).]

(3) Every female who is proved to have for the purposes of gain exercised control, direction, or influence over the movements of a prostitute, in such a manner as to show that she is aiding, abetting, or compelling her prostitution with any person, or generally, shall be deemed to be a rogue and vagabond within the meaning of the Vagrancy Act, 1824, and may be dealt with accordingly. [1912, section 7 (4).]

(4) The period of imprisonment with hard labour which may be awarded to a person deemed to be a rogue and vagabond under the foregoing provisions shall be increased to six months, but such person shall not be liable to be dealt with as an incorrigible rogue within the meaning of the Vagrancy Act, 1824. Save as aforesaid, nothing in this sub-section shall affect the powers of a Court of summary jurisdiction to deal with a person deemed to be a rogue and vagabond under the foregoing provisions, anything in any other Act to the contrary notwithstanding. [1912, section 7 (2) (4).]

(5) A person charged with an offence under the foregoing provisions may, instead of being proceeded against as a rogue and vagabond, be proceeded against on indictment, and on conviction on indictment shall be liable to imprisonment with or without hard labour for a term not exceeding two years, and, in the case of a second or subsequent conviction (such second or subsequent conviction being a conviction on indictment) the Court may, in addition to any term of imprisonment awarded, sentence the offender if a male to be once privately whipped, and the number of strokes and the instrument with which they shall be inflicted shall be specified by the Court in the sentence. [1912, section 7 (5).]

(6) The wife or husband of a person charged with an offence under the foregoing provisions may be called as a witness either for the prosecution or defence and without the consent of the person charged, but nothing in this provision shall affect a case where the wife or husband of a person

charged with an offence may at common law be called as a witness without the consent of that person. [1912, section 7 (6).]

(7) If it is made to appear to a Court of summary jurisdiction, by information on oath, that there is reason to suspect that any house or any part of a house is used by a female for purposes of prostitution, and that any male person residing in or frequenting the house is living wholly or in part on the earnings of the prostitute, the Court may issue a warrant authorising any constable to enter and search the house and to arrest that male person. [1898, section 1 (2).]

The saving in section 7 (2) of the new Act (paragraph (4) above) for the powers of a Court of summary jurisdiction should be noted. The effect of this saving is to exclude the operation of section 17 of the Summary Jurisdiction Act, 1879, as the application of that section would diminish the powers of a Court of summary jurisdiction by giving the defendant the option of claiming to be committed for trial on indictment. In this respect a Court of summary jurisdiction will have the same power of dealing finally with offences under the above provisions as it has of dealing with assaults which by the terms of section 17 of the Act of 1879, are excepted from the operation of that section; subject, of course, to the right of appeal to quarter sessions conferred by the Vagrancy Act, 1824. The Court will, however, if it thinks fit, have the option under paragraph (5) above of committing a case for trial to quarter sessions or assizes when much severer penalties may be imposed.

On the other hand the Court will no longer have power to deal with an offender as an incorrigible rogue (paragraph (4) above.)

The powers of arrest given under section 6 of the Vagrancy Act 1824 will continue to apply to offences under paragraph (1) and will apply to offences under paragraph (3).

CASES UNDER CRIMINAL LAW AMENDMENT ACT.

Four cases of importance were dealt with by the Court of Criminal Appeal on February 3rd; three were appeals against sentences of flogging; the fourth related to a point of evidence. In *Rex v. Timothy Patrick O'Connor* the prisoner had been convicted at the Central Criminal Court of "procuring for immoral purposes" and had been sentenced by Mr. Justice Darling to eighteen months' hard labour and 30 strokes of the cat. The latter part of the sentence was passed in pursuance of the Criminal Law Amendment Act, 1912, sec. 3; but as that statute only came into operation on December 13th, while the prisoner was arrested on December 7th for an offence committed in the earlier part of 1912, it was doubtful whether the power to inflict a sentence of flogging conferred for the first time by the statute could apply to such a case, and the learned Judge granted a certificate to appeal against his own sentence. As was anticipated in these columns in commenting on the case at the time (January 25th), the Court of Criminal Appeal held that the power so conferred did not apply to the case of a prisoner arrested before the statute, for sec. 8 says that: "this Act shall not apply to proceedings pending at the commencement of this Act." Proceedings, the Court held, commence in criminal cases at the date when information is laid and a summons issued. The sentence, accordingly, was altered by quashing that part of it which related to flogging and substituting a further period of six months' hard labour, making two years in all. The prisoner had also appealed against the conviction on the ground that the evidence of the woman procured was not corroborated as required by the Criminal Law Amendment Act, 1885, in the case of such offences. The Court held that there was sufficient corroboration of her story in the fact that she had been an innocent woman before her marriage with the prisoner, but within a week afterwards had been seen on the streets acting as a common prostitute while he was hanging about engaged in watching her.

In another case under the new Criminal Law Amendment Act, *Rex v. Austin*, it was decided that—except so far as "pending proceedings" are concerned—the statute is retrospective. In other words, a person convicted of an

offence under the statute committed before it came into operation, but not proceeded against until after that date, can be punished in the manner provided by the Act. Sec. 7 (5) enacts that a male person can be proceeded against, either summarily or on indictment, for living on the immoral earnings of a woman, and that, if convicted a second time, "such second and subsequent conviction being a conviction on indictment," he is liable to two years' hard labour and a sentence of flogging. The Court held (1) that only the second conviction need be on indictment to bring this sub-sec. into operation, the first need be only a summary conviction, and (2) that the new mode of punishment applied to an offence committed before the Act received the Royal Assent. As Mr. Justice Phillimore pointed out in his judgment, dismissing the prisoner's appeal against a sentence of flogging passed on him in pursuance of sec. 7 (5), the ordinary rule that a penal statute will not be construed retrospectively was inapplicable to the present case for two reasons. In the first place, the rule, generally speaking, applies only when Parliament creates a new offence, not when it merely alters the procedure for dealing with conduct which was already criminal prior to its enactment. Here the prisoner, on a second offence, under the previous law could have been committed to Quarter Sessions as an "incorrigible rogue" under the Vagrancy Act of 1898, and there sentenced to flogging; the new Act merely substituted for this procedure an indictment and trial by jury.

In the third case, *Rez v. Brown*, the prisoner appealed on grounds of ill-health against a sentence which included corporal punishment passed upon him at the London County Sessions; but the Court held that it was not within their sphere of duty to consider the medical evidence as to the severity of the sentence; that was the duty of the prison doctor, who could stop the punishment if the prisoner's health did not permit of it being inflicted without danger to life.

INTERESTING POINTS OF LAW DECIDED BY
VARIOUS COURTS.

CONTRACT TO TAKE SHARES.

Mair v. Rio Grande Rubber Estates (Lim.) is of interest by reason of its relation to the well-known case of *In re Karberg*, [1892] (3 Ch, 1). The prospectus set forth a report received by the directors from an expert who was, in point of fact, himself a director and a promoter of the company. The report referred in highly optimistic terms to the prospects of the company's estates; but it was further stated in the prospectus that no part of the price would be paid until the report had been confirmed by an independent observer. It was not denied that the report had in fact been received; but it was proved to be full of gross misstatements. The pursuer claimed to have his contract rescinded. It was held, however, that there had been no misrepresentation by the directors; and *Karberg's case*, which was explained by the Lord President as a case not of misrepresentation (for there was no misstatement there by the company or its agents), but of essential error, was distinguished on the ground that the directors could here not be taken to have known that the shares had been applied for on the faith of one particular paragraph of the prospectus, which must be read as a whole.

MISFEASANCE OR NON-FEASANCE.

Ryan v. Tipperary County Council (an action under Lord Campbell's Act) was a local government case of a different character but of equal interest. The plaintiff's father had driven in a cart along a road which the council was engaged in repairing. One of his wheels struck a stone which had, to the knowledge of the council's workmen, been lying in the road for two or three days. He was thrown out of his cart in front of a steam-roller, run over, and killed. The defendants contended that their failure to remove the stone was a mere non-feasance for which they were not liable. It was admitted that had the stone been the only element in the case there would have been no cause of action; but the Court, applying *Mayor of Shoreditch v. Bull*, [1907] 68 J. P. 415, held that the defendants' interference with the

normal structure of the road imposed on them the duty of removing dangerous obstructions, and that in such circumstances the non-feasance might be traced back to the act which made the omission dangerous.

CONTRACTS ILLEGAL OR ULTRA VIRES.

A curious case arising out of the Birkbeck Building security liquidation came before the Divisional Court last week on appeal from the Judge of the Westminster County Court (*Brougham v. Dwyer*, Jan. 29). The action was brought by the liquidator to recover from a customer of the Birkbeck Bank, which had been carried on by the society as part of its business, a sum of 30*l.* odd, in respect of an overdraft, and the defence was raised that, the banking business having been declared by the Court of Appeal to be *ultra vires* the society, it was illegal, and the action could not, therefore, be maintained. The County Court Judge adopted that view, but the Divisional Court made it clear that "illegal" was exactly what the business was not in the sense in which the word was used by the Court of Appeal, for, as Lord Justice Buckley said in his judgment, "a transaction which is illegal is forbidden by law; a transaction which is *ultra vires* is precluded by the incompetence of the actor." Here the contract was not illegal in the sense that no one had a right to make it, but it was only forbidden because of the incompetency of the actor, viz., the society, and incompetency is not the same thing as illegality. According to Mr. Justice Lush, there was nothing wrong or illegal about the transaction, but, the society being incompetent to enter into it, "it did not exist in point of law," and the money might be recovered on the same principle apparently, as would apply to the recovery of money paid by mistake. The problem is by no means so simple, for, according to the accepted English authorities (though the American ones are different), in every case without exception it has been held that an *ultra vires* contractual engagement, whether executed or not, is not enforceable, at least by action directly upon the engagement itself. And in the leading case of *Balfour v. Ernest* (1859), it was held that not even securities given in consideration of *ultra vires* engagements could be enforced, even though the transaction in which they were given was completed, and not merely

executory. But there is a real distinction between contracts which are illegal, and contracts which are only *ultra vires*. The former are void and cannot be sued on because of the illegality; the latter are also void and cannot be sued on as contracts, but there is an equitable right to an account, and in such an action the money found due may be ordered to be repaid, notwithstanding the incompetency of the contracting corporation to enter into the transaction.

NATIONAL TELEPHONE CO. (LIMITED) v. HIS MAJESTY'S
POSTMASTER-GENERAL.

By the agreement by which the Postmaster-General acquired, as from December 31st, 1911, the undertaking of the National Telephone Company it was, *inter alia*, provided that "the value on December 31st, 1911, of all plant, land, buildings, stores, and furniture purchased by the Postmaster-General . . . shall be the then value (exclusive of any allowance for past or future profits of the undertaking or any compensation for compulsory sale or other consideration whatever) of such plant, land, buildings, stores, and furniture, having regard to its suitability for the purposes of the Postmaster-General's telephonic service, and in determining the value of any plant no advantage arising from the construction of such plant, by leave of the Postmaster-General, upon any railway or canal over which the Postmaster-General possesses exclusive rights of way for telegraphic lines shall be taken into account."

Held, that the value of the plant taken over by the Postmaster-General was to be arrived at by taking the cost of construction, less depreciation, and that every expense which was necessary to construct the plant was an element to be considered, including in such expense (*inter alia*) the reasonable costs of obtaining subscribers' agreements which were in force at the date of the transfer, and also (Sir James Woodhouse dissenting) the costs of raising capital necessary to construct the plant. Held, further, that the method of depreciation applicable was to take the value as reduced in the ratio which the age bore to the life of the plant, and that the mode of computing the life of the plant was to take its physical life as reduced somewhat in respect of defects and obsolescence of certain classes of the plant.

IS A PAST DEBT A VALUABLE CONSIDERATION
FOR A SECURITY?

It is thought that not a few lawyers by no means unlearned have been under the impression that a past debt is a sufficient valuable consideration for a security for the payment of the same. It is evident, however, from the authorities that the mere existence of such a debt is not such a valuable consideration. In addition thereto there must be an agreement, express or implied, to give time, or some further consideration, or else there must be an actual forbearance to sue in consequence of the security. One of the earliest cases on the point is that of *Alliance Bank v. Broom* (2 Dr. & Sm. 289). In that case a banker required security from his customer for an overdrawn account. The customer by letter promised to hypothecate certain goods, but, upon being asked for the delivery warrants, he refused to carry out his promise. A bill which had been filed to enforce such promise was demurred to on the ground that the promise was made without consideration. It was held that the forbearance of the bank to sue for the debt in consequence of the promise was a sufficient consideration to support it, and the demurrer was overruled. Vice-Chancellor Kindersley in the course of his judgment said: "It appears to me that when a creditor demands payment of a debt, and the debtor in consequence of that application agrees to give a certain security, although there is no promise by the creditor to abstain from suing for any given time, yet the effect is that the creditor does in fact give, or must be assumed to give, and the debtor receives, or must be assumed to receive, the benefit of some degree of forbearance, although for no definite or fixed period. If the debtor had refused to give any security at all, the creditor might, of course, have taken immediate steps to enforce payment, but, in consequence of the promise to hypothecate, the debtor does receive some degree of forbearance. It is true that at any time, notwithstanding the promise, the creditor might insist upon immediate payment and bring an action even after the security is given, but still the circumstances necessarily imply or involve the attainment on the part of the debtor of a certain amount of forbearance which he would not otherwise receive." That judgment was approved of by the House of Lords in *Fullerton and*

Provincial Bank of Ireland (89 L. T. Rep. 79; (1903) A. C. 309). That was a case where a customer of an Irish bank, having overdrawn his account and being pressed by the bank, undertook by letter to deposit a title deed of an estate in Ireland as security for his overdraft; and it was held that such letter amounted to an agreement to create an equitable charge, and ought to have been registered under 6 Anne (Ir.), ch. 2. Lord Macnaghten said: "In such a case as this it is not necessary that there should be an agreement for forbearance for any definite or particular time. It is quite enough if you can infer from the surrounding circumstances that there was an implied request for forbearance for a time, and that forbearance for a reasonable time was in fact extended to the person who asked for it. The point came before Mr. Justice Parker in *Wigan v. English and Scottish Law Life Assurance Association* (100 L. T. Rep. 34; (1909) 1 Ch. 291). There H. was the holder of a policy of assurance on his own life conditioned to be void if the assured died by his own hand, "but without prejudice to the *bona fide* interests of third parties based on valuable consideration." H., being indebted to W. in large sums of money, caused to be prepared and executed an assignment of the policy to W. by way of mortgage. W. had not asked for further security, but negotiations were proceeding with a view to giving time for payment of the debt. W. had no notice of the assignment until after H.'s death by his own hand. Held that there was no valuable consideration for the assignment. In the course of a luminous judgment, in which Mr. Justice Parker reviewed the authorities, his Lordship expressed his opinion "that the mere existence of a debt from A. to B. is not sufficient valuable consideration for the giving of a security from A. to B. to secure that debt." His Lordship further said: "If there be no express agreement, the law may very readily imply an agreement to give time. It may not be a definite time, but to forbear for some indefinite time in consideration of the security being given. And further than that, if there is no express agreement, and no agreement can be implied at the time and under the circumstances at and under which the indenture giving the further security is executed, yet if that security be communicated to a person who could otherwise sue on the debt, and on the strength of that security he does in fact forbear to sue on the debt, he does give that time with the object of securing which the security is presumably given, and then I

think it appears on the cases that there is sufficient consideration, though in a sense it is an *ex post facto* consideration, for the security which is given." The question has recently come before the Court of Appeal in *Clegg v. Bromley* (106 L. T. Rep. 825; (1912) 3 K. B. 474). That was a case where a lady, being indebted to her husband in a large sum of money, executed an assignment in his favour whereby, after reciting that he had requested her to give him further security, which she had agreed to do, she assigned to him all the interest, money, and premises to which she was or might become entitled under or by virtue of a certain action, or by any compromise or agreement which she might obtain in or consequent upon such action, subject to redemption; and it was held that (1) the assignment was made for good consideration; and (2) that it was not an assignment of a mere expectancy or cause of action, but was an assignment of property—that is, of the fruits of an action as and when recovered—and was not consequently void under 13 Eliz. ch. 5. Lord Justice Vaughan Williams in the course of his judgment said, referring to *Wigan v. English and Scottish Law Life Assurance Association* before cited: "In the early part of his decision Mr. Justice Parker affirms the proposition with which I should imagine everyone agrees—that is, that the mere existence of a debt is not good consideration in itself." Lord Moulton (then Lord Justice Fletcher Moulton) said that several cases established "that the mere existence of an antecedent debt is not good consideration for an assignment even by way of further security." Mr. Justice Parker, sitting as an appeal Judge, referring to *Wigan v. English and Scottish Law Life Assurance Association*, said: "The *ratio decidendi* of that case was clearly that there could have been no forbearance or alteration of position on the part of the mortgagee on the strength of the new security, because he had no notice of it whatever. . . . I think that where a creditor asks for and obtains a security for an existing debt the inference is that, but for obtaining the security, he would have taken action which he forbears to take on the strength of the security." The case of *Clegg v. Bromley* may also usefully be read in connection with an article in this journal of the 27th January, 1912, p. 294, as to "the assignability of a right to sue to set aside a deed obtained by fraud."

LIABILITY OF OWNER OF IRRIGATION DITCH FOR DAMAGES ARISING FROM ITS CONSTRUCTION AND MAINTENANCE.

The rule is well settled that the owner of an irrigation ditch must exercise reasonable care and skill to prevent the ditch from causing injury to others. Consequently he is liable for all damages sustained by others as a result of his negligence or unskillfulness in constructing, maintaining, or operating the ditch.¹

In the California case just cited (*Bacon v. Kearney, etc.*), the rule was stated thus: "The owner of an artificial ditch, through which water flows for domestic use or for irrigation, as in this case, is bound to keep such ditch in repair, so that the water running therein will not break through or escape therefrom and damage the land or crops of another, and if through any fault or negligence of his in not properly managing the ditch, or keeping it in repair, the water does escape therefrom and injures the lands and crops of another, he is liable, and the law will hold him responsible for whatever damage may be done." The defendant in this case quoted numerous authorities to the effect that "one who does a lawful act upon his own premises cannot be held for injuries resulting, unless the act was done in a way to indicate negligence." The Court agreed with this, but shewed from the evidence that defendant was negligent in causing the injury complained of. The ditch owner is not liable merely because the break or escape occurred, but only if it occurred through his negligence, and this negligence must be shewn. It is not even a case of *res ipsa loquitur* and negligence is not presumed from the mere fact that a break or escape occurred, unless such presumption is especially enacted by statute.² Ditch companies are required by statute to construct bridges over such ditches as cross public highways and are liable for damages caused by the failure to maintain such damages.³ An irrigation district and a con-

¹ *Bacon v. Kearney Vineyard Syndicate*, 1 Cal. App. 275, 82 Pac. 84; *Greeley Irrigation Co. v. House*, 14 Colo. 549, 24 Pac. 329; *McCarty v. Boise City Canal Co.*, 2 Idaho 225, 10 Pac. 623; *Big Goose, etc., Ditch Co. v. Morrow*, 8 Wyo. 537, 59 Pac. 159.

² *Water Rights in the Western States*, Wiel, 3rd Ed., p. 489, and cases there cited covering arid and semi-arid states.

³ *Farmers' High Line Canal, etc., Co., v. Westlake*, 23 Colo. 26, 46 Pac. 124; *R. S. Colo.*, 1908, Sec. 3235.

tractor have been held liable for damages to land arising from seepage from a canal during its construction.⁴ And one who irrigates his land by means of a ditch supplied by an artesian well is liable to an adjoining landowner for injury caused to his land by water percolating from the ditch where the injury might have been prevented by the defendant.⁵ An irrigation company was held liable for damages to plaintiff where it permitted the water to overflow the banks of its ditch and flood plaintiff's land, though it had been warned that the ditch was running too full and that the water was in danger of escaping unless the flow was diminished. Defendant was held not to avoid the consequences of its own negligence on the plea that gophers burrowed the banks and that, therefore, the overflow was the result of unavoidable accident. Its liability arose from its failure to exercise ordinary care in preventing the escape of water.⁶ Where alkali water percolated from a canal and injured an orchard, it was held that the defendants were liable if they were negligent, irrespective of whether they operated their canal as others did.⁷ A ditch company, with the right to maintain its ditch over the lands of another, the company using as a part of its ditch a natural depression, draw or gulch, is liable to the landowner for injury to stock which fell into the depression, because of the company's failure to guard it. The fact that the landowner's stock was driven toward the ditch by a snowstorm did not make that fact the natural and proximate cause of the injury. A person is not liable, as a general rule, for anything beyond the natural, ordinary and reasonable consequences of his conduct. But storms are liable to occur. They are natural and not extraordinary, and, therefore, to be guarded against by providing barriers to keep cattle from getting into dangerous places. In this case, the failure to guard the ditch properly was the cause of the loss of the cattle and the damage was not so remote as to exonerate the company.⁸ An employee of a ditch company who opens a waste gate to relieve the canal of an overplus of water and thereby causes injury to

⁴ *Turpen v. Turlock Irrigation Dist.*, 141 Cal. 1, 74 Pac. 295.

⁵ *Parker v. Larson*, 86 Cal. 236, 24 Pac. 989.

⁶ *Greely Irrigating Co. et al. v. House*, 14 Colo. 549, 24 Pac. 829.

⁷ *Jenkins v. Hooper Irrigation Co.*, 13 Utah 100, 44 Pac. 829.

⁸ *Big Goose & Beaver Ditch Co. v. Morrow*, 8 Wyo. 537, 59 Pac. 159, 80 Am. St. Rep. 955.

a landowner, makes the company liable therefor.⁹ And a municipal corporation which is the owner of an irrigating ditch is liable for injuries arising from the percolation of water therefrom.¹⁰

Liability in the Absence of Negligence.—Where the ditch owner is not negligent, he is not liable. Neither is he liable where the injury is due to an act of God or an inevitable accident. Thus, an irrigation canal owner is not liable for injuries resulting from a break in his canal which is caused by the heaviest rainstorm that ever occurred in his locality and where his canal was safeguarded by waste-ways and culverts which had never before failed to carry off the waste water, and by ditch walkers.¹¹ The same is true where the break in the defendants' ditch is caused by the accidental fall of a tree.¹²

But a ditch owner is liable for damages resulting from his failure to provide against melting snow and floods and rainfalls as may reasonably be anticipated.¹³ And though the ditch is injured by an inevitable accident, it is the duty of the owner to prevent injury to others by making repairs at the earliest opportunity. Thus where a ditch was allowed to remain unrepaired for two or three weeks it was held to be negligence *per se*.¹⁴

Ditch owners are liable in damages for trespass to owners of land across which they have constructed ditches without authority, as, for illustration, in the following rather unusual case: Defendant constructed a ditch through land entered by plaintiff under the laws of the United States for the reclamation of desert-land. Plaintiff relinquished this entry and at the same time homesteaded the land. Defendant claimed that on the relinquishment of the desert-land entry, the land became public land of the United States and a right-of-way at once vested in defendant for its ditch under the laws of Congress giving right-of-way for such ditches over the public lands. But the Appellate Court could not see the force of this contention and said that the

⁹ *Stuart v. Noble Ditch Co.*, 9 Idaho 765, 76 Pac. 255.

¹⁰ *Boulder v. Fowler*, 11 Colo. 396, 18 Pac. 337.

¹¹ *Grand Valley Irrigation Co. v. Pitzer*, 14 Colo. App. 123, 59 Pac. 420.

¹² *Tenny v. Miner's Ditch Co.*, 7 Cal. 335.

¹³ *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Lisonbes v. Monroe Irrigation Co.*, 18 Utah 343, 54 Pac. 1009, 72 Am. St. Rep. 784; *Burbank v. West Walker River Ditch Co.*, 13 Nev. 431; *Arave v. Idaho Canal Co.*, 5 Idaho 68, 46 Pac. 1024.

¹⁴ *Catlin Land etc., Co., v. Bent*, 2 Colo. App. 481, 31 Pac. 391.

land did not revert to the United States under these laws by the relinquishment of the desert-land entry so as to give defendant the right to construct its ditch through it.¹⁵

Contributory Negligence of Plaintiff.—Where one turns stock upon the land of another through which flows an irrigating ditch, after such ditch has become dangerous to cattle pasturing on such land, and with full knowledge of such dangerous condition, he does so at his peril.¹⁶ But a distinction should be observed between the plaintiff's failure to avoid the consequences of defendant's negligence and the plaintiff's acts which enhance his injury. To illustrate: If the plaintiff is negligent in irrigating her own land, but does not hereby cause injury to another, she is at liberty to irrigate as suits her fancy, but that fact does not relieve the defendant from liability for discharging thereon quantities of water which augment the damage.¹⁷ The owner of an irrigation ditch, from which water continues to escape, after notice, upon the premises of an adjoining landowner, cannot escape liability on the ground that such landowner could, at small expense, have prevented any damage by digging on his own land a ditch which would have carried off the water.¹⁸ Nor is the plaintiff required to commit a trespass by going upon the lands of another in order to abate the nuisance.¹⁹

Negligence of Third Person.—The fact that water which escapes from defendant's ditch and mingles with water from other sources does not relieve him from liability. The fact that other owners are also negligent does not excuse the wrongful act of defendant.²⁰

Statutory Liability of Reservoir Owner in Colorado.—The famous English case of *Rylands v. Fletcher*,²¹ declared that a man builds a reservoir, or other works to hold water, at his peril. But such is not the law in the West, unless made so by statute. In Colorado, a statutory liability is enacted in R. S. 1908, sec. 3204, 3213, 1 M. A. S. sec. 2272, 3 M. A. S. sec. 2270, and is simply in affirmation of the common law

¹⁵ *Clear Creek Land Co. v. Kilkenny*, 5 Wyo. 38, 36 Pac. 819.

¹⁶ *Messenger v. Gordon*, 15 Colo. App. 420, 62 Pac. 959; see *Mills Colo. Digest*, Vol. 3, p. 607, for Pleading in such cases.

¹⁷ *Emission v. Owyhee Ditch Co.*, 37 Ore. 577, 62 Pac. 13. Compare, *Tucker v. Flouring Mills Co.* 15 Ore. 551, 16 Pac. 426.

¹⁸ *Shields v. Orr Extension Ditch Co.*, 23 Nev. 349, 47 Pac. 194.
¹⁹ *Barstow Irrigation Co. v. Black*, 39 Tex. Civ. App. 80, 86, S. W. 1086.

²⁰ *McCarty v. Boise Canal Co.*, 2 Idaho 225, 10 Pac. 623.

²¹ L. R. I. Ex. 265; R. 3 H. L. 330.

rule on this subject. It seems to approach close to the rule in the *Rylands v. Fletcher* case as concerns reservoirs, for the Court holds the owner of reservoirs to a strong liability under it, on the ground that the water is likely to escape and to do damage if it does escape;²² and the owner is liable, irrespective of negligence;²³ and also irrespective of a statute requiring supervision in the construction of the reservoir by the State Engineer.²⁴ In the case just cited, *Garnet v. Sampson*, it was urged that the statute imposes no liability except for the breaking of the dam or bank of the reservoir, for neither the bank nor the reservoir broke, but the injury was occasioned by the washing out of the mesa or hillside; and it was contended further that the words "embankment" and "dam" cannot be construed to cover or include natural barriers. The Court denied this contention, and said that whenever a reservoir owner uses a natural bank or dam for impounding water, he adopts it as a part of his reservoir and must be held to the same liability as if it were built by him.

JOHN E. ETHELL.

Glenwood Springs, Colo.

²² *Canon City v. Oxtoby*, 45 Colo. 214, 100 Pac. 1127.

²³ *Garnet, Etc., Co. v. Sampson*, 110, Pac. 79.

²⁴ *Ibid.*

MICHIGAN CENTRAL RAILROAD COMPANY v.
DANIEL B. VREELAND

COURTS—ERROR TO CIRCUIT COURT—DISMISSAL—GROUNDS.

1. A writ of error from the Federal Supreme Court will not be dismissed because the constitutional questions which furnished the ground for bringing the case directly to the Supreme Court have, since the allowance of the writ of error, been decided by that Court in another case adversely to the plaintiff in error.

DEATH—ABATEMENT—ACTION FOR PERSONAL INJURIES.

2. The right of action created by the Employers' Liability Act of April 22nd, 1908 (35 Stat. at L. 65, ch. 149, U. S. Comp. Stat. Supp. 1911, p. 1322), in behalf of an injured interstate railway employee, is extinguished by his death, because of the failure of that statute to provide for any survival of such right of action, and it cannot be helped out by any State legislation on the subject.

DEATH — RIGHT OF ACTION FOR CAUSING — EFFECT OF
TEMPORARILY SURVIVING INJURY.

3. The liability to certain relatives dependent upon the decedent, which is imposed by the Employers' Liability Act of April 22nd, 1908, on an interstate railway carrier negligently causing the death of an employee while engaged in interstate commerce, is not limited to cases where death was instantaneous, the right of action thus created being independent of any cause of action, which the decedent had, and including no damages which he might have recovered for his injury if he had survived.

DEATH—DAMAGES—"PECUNIARY BENEFIT."

4. The financial benefit which might reasonably be expected from her husband in a pecuniary way is the measure of damages in an action brought against an interstate railroad carrier under the Employers' Liability Act of April 22nd, 1908, for the benefit of the widow of an employee killed while engaged in interstate commerce.

APPEAL AND ERROR—REVERSIBLE ERROR IN INSTRUCTION—
DAMAGES.

5. Instructing the jury to estimate from their own experience as men the financial value of a widow's loss of her husband's "care and advice" requires the reversal of a judgment against a carrier in an action brought under the Employers' Liability Act of April 22nd, 1908, for the death of her husband while in the carrier's employ, as opening the door to conjecture and speculation.

In error to the Circuit Court of the United States for the northern district of Ohio to review a judgment against a carrier in an action brought under the Employers' Liability Act for the benefit of the widow of an employee who was killed while engaged in interstate commerce. Reversed and a new trial ordered.

Mr. Justice Lurton delivered the opinion of the Court:—

This was an action under the Employers' Liability Act of April 22nd, 1908, [35 Stat. at L. 65, ch. 149, U. S. Comp. Stat. Supp. 1911, p. 1322], to recover damages for the wrongful death of the intestate, an employee in the service of the railroad company. The constitutionality of the Act was drawn in question by the plaintiff in error in the Court below, and this afforded ground for bringing the case directly to this Court. Since the allowance of the writ of error all of the constitutional questions have been decided adversely to the plaintiff in error. Second Employers Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 56 L. ed. 327, 38 L. R. A. (N.S.) 44, 32 Supt. Ct. Rep. 169. But this does not justify our dismissing the case, since the constitutional questions which gave the right to bring it here were not foreclosed when the writ was allowed, and we, therefore have jurisdiction to consider other assignments of error.

These relate to the construction of the Act and the measure of damages thereunder. Sections 1 and 2 of the Act of 1908, and No. 2 of the Amendatory Act of April 5th, 1910, [36 Stat. at L. 291, ch. 143, U. S. Comp. Stat. Supp., 1911, p. 1325], are set out in the margin.†

†Sec. 1. That every common carrier by railroad, while engaging in commerce between any of the several states or territories, or between any of the states and territories, or between the District of Columbia and any of the states or territories, or between the District of Columbia or any of the states or territories and any foreign nation or nations, shall be liable in damages to any person

This case, however, involves only a construction of the Act prior to the amendment referred to.

The decedent survived his injuries for several hours. His personal representative has brought this action, not for the injury suffered by his intestate, but for the loss suffered by his widow as a consequence of his wrongful death.

For the railroad company it has been argued that the fact that the injured employee survived his injuries for several hours operates to extinguish its liability for both the wrongful injury and the death which ensued. The view of counsel seems to be that the Act declared a single liability and constituted a cause of action in behalf of the injured person if he survived, or, in case his death was instantaneous, a cause of action for the benefit of the specified dependent relatives surviving. This is a narrow interpretation of the Act, and would operate to defeat all liability unless the injured person should survive long enough to conduct his action to a recovery.

We think the Act declares two distinct and independent liabilities, resting, of course, upon the common foundation of a wrongful injury, but based upon altogether different principles. It plainly declares the liability of the carrier to its

suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Sec. 2. That every common carrier by railroad in the territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States, shall be liable in damages to any person suffering injury while he is employed by such carrier in any of said jurisdictions, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Section 2 of the act of April 5, 1910:

That said act be further amended by adding the following section as section nine of said act:

Sec. 9. That any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

injured servant. If he had survived he might have recovered such damages as would have compensated him for his expense, loss of time, suffering, and diminished earning power. But if he does not live to recover upon his own cause of action, what then? Does any right of action survive his death and pass to his representative? This is a question which depends upon the statute.

We may not piece out this Act of Congress by resorting to the local statutes of the State of procedure or that of the injury. The Act is one which relates to the liability of railroad companies engaged in interstate commerce to their employees while engaged in such commerce. The power of Congress to deal with the subject comes from its power to regulate commerce between the States.

Prior to this Act, Congress had not deemed it expedient to legislate upon the subject, though its power was ample. "This subject," as observed by this Court in Second Employers' Liability Cases (*Mondou v. New York, N. H. & H. R. Co.*), 223 U. S. 1, 54, 56 L. ed. 327, 347, 38 L. R. A. (N.S.) 44, 32 Sup. Ct. Rep. 169, "is one which falls within the police power of the State in the absence of legislation by Congress." *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96, 99, 32 L. ed. 352, 353, 2 Inters. Com. Rep. 238, 9 Sup. Ct. Rep. 28. By this Act Congress has undertaken to cover the subject of the liability of railroad companies to their employees injured while engaged in interstate commerce. This exertion of a power which is granted in express terms must supersede all legislation over the same subject by the States. Thus, in *Gulf, C. & S. F. R. Co. v. Hefley*, 158 U. S. 98, 104, 39 L. ed. 910, 912, 15 Sup. Ct. Rep. 802, it was said, in reference to State legislation touching freight rates upon interstate freight which conflicted with the legislation of Congress upon the same subject, that:—

"Generally it may be said in respect to laws of this character that, though resting upon the police power of the State, they must yield whenever Congress, in the exercise of the powers granted to it, legislates upon the precise subject-matter, for that power, like all other reserved powers of the States, is subordinate to those in terms conferred by the Constitution upon the nation. 'No urgency for its use can authorize a State to exercise it in regard to a subject-matter which has been confided exclusively to the discretions of Congress by the Constitution.' *Henderson v. New York*

(*Henderson v. Wickham*), 92 U. S. 259, 271, 23 L. ed. 543, 548. 'Definitions of the police power must, however, be taken, subject to the condition that the State cannot, in its exercise, for any purpose whatever, encroach upon the powers of the general Government, or rights granted or secured by the supreme law of the land.' *New Orleans Gaslight Co. v. Louisiana Light & H. P. & Mfg. Co.*, 115 U. S. 650, 661, 29 L. ed., 516, 520, 6 Sup. Ct. Rep. 252. 'While it may be a police power in the sense that all provisions for the health, comfort, and security of the citizens are police regulations, and an exercise of the police power, it has been said more than once in this Court that, where such powers are so exercised as to come within the domain of Federal authority as defined by the Constitution, the latter must prevail.' *Morgan's L. & T. R. & S. S. Co. v. Board of Health*, 118 U. S. 455, 464; 30 L. ed. 237, 241; 6 Sup. Ct. Rep. 1114."

It, therefore, follows that in respect of State legislation prescribing the liability of such carriers for injuries to their employees while engaged in interstate commerce, this Act is paramount and exclusive, and must remain so until Congress shall again remit the subject to the reserved police power of the States. *Ried v. Colorado*, 187 U. S. 137, 146; 47 L. ed. 108, 113; 23 Supt. Ct. Rep. 92; 12 Am. Crim. Rep. 506.

The statutes of many of the States expressly provide for the survival of the right of action which the injured person might have prosecuted if he had survived. But unless this Federal statute which declares the liability here asserted provides that the right of action shall survive the death of the injured employee, it does not pass to his representative, notwithstanding State legislation. The question of survival is not one of procedure, "but one which depends on the substance of the cause of action." *Schreiber v. Sharpless*, 110 U. S. 76, 80; 28 L. ed. 65, 66; 3 Sup. Ct. Rep. 423; *Martin v. Baltimore & O. R. Co.* (*Gerling v. Baltimore & O. R. Co.*), 151 U. S. 673; 38 L. ed. 311; 14 Sup. Ct. Rep. 533.

Nothing is better settled than that at common law, the right of action for an injury to the person is extinguished by the death of the party injured. The rule, "*actio personalis moritur cum persona*," applies, whether the death from the injury be instantaneous or not. The Act of 1908 does not provide for any survival of the right of action created in behalf of an injured employee. That right of action was

therefore, extinguished. The Act has been many times so construed by the circuit Courts. We cite a few of the cases: *Fulgham v. Midland Valley R. Co.*, 167 Fed. 660; *Walsh v. New York, N. H. & H. R. Co.*, 173 Fed. 495.

At common law, loss and damage may, in some cases, accrue to persons dependent upon one wrongfully injured, and a right of action in some cases arises in their behalf. But this cause of action, except for loss of personal services before the death, abates at the death.

In *Baker v. Bolton*, 1 Campb. 493, Lord Ellenborough ruled that "in a civil Court, the death of a human being could not be complained of as an injury." *Mobile L. Ins. Co. v. Brame*, 95 U. S. 756; 24 L. ed. 580. *The Harrisburg*, 119 U. S. 199, 204; 30 L. ed. 358, 359; 7 Sup. Ct. Rep. 140.

The obvious purpose of Congress was to save a right of action to certain relatives dependent upon an employee wrongfully injured, for the loss and damage resulting to them financially by reason of the wrongful death. Thus, after declaring the liability of the employer to the injured servant, it adds—"or in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husbands and children of such employee; and, if none, then of such employee's parents; and, if none, then the next of kin dependent upon such employee, for such injury or death," etc. There is no express or implied limitation of the liability to cases in which the death was instantaneous.

This cause of action is independent of any cause of action which the decedent had, and includes no damages which he might have recovered for his injury if he had survived. It is one beyond that which the decedent had—one proceeding upon altogether different principles. It is a liability for the loss and damage sustained by relatives dependent upon the decedent. It is, therefore a liability for the pecuniary damage resulting to them, and for that only.

The statute, in giving an action for the benefit of certain members of the family of the decedent, is essentially identical with the first act which ever provided for a cause of action arising out of the death of a human being—that of 9 & 10 Vict. ch. 93, known as Lord Campbell's Act. This Act has been, in its distinguishing features, re-enacted in many of the States, and both in the Courts of the States and

of England has been construed not as operating as a continuance of any right of action which the injured person would have had but for his death, but as a new or independent cause of action for the purpose of compensating certain dependent members of the family for the deprivation, pecuniarily, resulting to them from his wrongful death. For convenience in comparing Lord Campbell's Act with the Act of Congress of 1908, the 1st and 2nd sections of the former are set out in the margin.†

In one of the earliest cases which arose under the Act, Coleridge, J., said:—

“It will be evident that this Act does not transfer this right of action to his representative, but gives to the representative a totally new right of action, on different principles.” *Blake v. Midland R. Co.*, 18 Q. B. 93.

In *Seward v. The Vera Cruz*, L. R. 10 App. Cas. 59, Lord Blackburn said:—

“A totally new action is given against the person who would have been responsible to the deceased if the deceased had lived—an action which . . . is new in its species, new in its quality, new in its principle, in every way new, and which can only be brought if there is any person answering the description of the widow, parent, or child, who under such circumstances, suffers pecuniary loss.”

But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrongful injury. *Tiffany*, Death by Wrongful Act, sec. 124; *Louisville, E. & St. L. R. Co. v. Clarke*, 152 U. S. 231; 38 L. ed. 422; 14 Sup.

†Whensoever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect, or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death, etc.

The 2nd section provides that,—

Every such action shall be for the benefit of the wife, husband, parent, and child of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator of the person deceased; and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom and for whose benefit such action shall be brought.

Ct. Rep. 579. *Read v. Great Eastern R. Co.*, L. R. 3 Q. B. 555, 9 Best. & S. 714, 37 L. J. Q. B. N. S. 278; 18 L. T. N. S. 82; 16 Week. Rep. 1040. *Hecht v. Ohio & M. R. Co.* 132 Ind. 507; 32 N. E. 302. *Fowlkes v. Nashville & D. R. Co.*, 9 Heisk. 829; *Littlewood v. New York*, 89 N. Y. 24, 42 Am. Rep. 271; *Southern Bell Teleph. & Teleg. Co. v. Cassin*, 111 Ga. 575, 50 L. R. A. 694, 36 S. E. 881.

The distinguishing features of that Act are identical with the Act of Congress of 1908 before its amendment: First, it is grounded upon the original wrongful injury of the person; second, it is for the exclusive benefit of certain specified relatives; third, the damages are such as flow from the deprivation of the pecuniary benefits which the beneficiaries might have reasonably received if the deceased had not died from his injuries.

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary. That is not the sole test. There must, however, appear some reasonable expectation of pecuniary assistance or support of which they have been deprived. Compensation for such loss manifestly does not include damages by way of recompense for grief or wounded feelings. *Tiffany*, Death by Wrongful Act, secs. 153, 154; *Illinois C. R. Co. v. Barron*, 5 Wall. 90, 105, 106, 18 L. ed. 591, 594, 595; *Davis v. Guarneri*, 45 Ohio St. 470, 4 Am. St. Rep. 548, 15 N. E. 350; *Blake v. Midland R. Co.*, 18 Q. B. 93, 21 L. J. Q. B. N. S. 233, 16 Jur. 562; *Hurst v. Detroit City R. Co.*, 84 Mich. 539, 545, 48 N. W. 44; *Munro v. Pacific Coast Dredging & Reclamation Co.*, 84 Cal. 515, 18 Am. St. Rep. 248, 24 Pac. 303.

The word "pecuniary" did not appear in Lord Campbell's Act, nor does it appear in our Act of 1908. But the former Act and all those which follow it have been continuously interpreted as providing only for compensation for pecuniary loss or damage.

A pecuniary loss or damage must be one which can be measured by some standard. It is a term employed judicially, "not only to express the character of that loss to the beneficial plaintiffs which is the foundation of their right of recovery, but also to discriminate between a material loss which is susceptible of a pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not

possible to set a pecuniary valuation." Patterson, Railway Acci. Law, sec. 401.

Nevertheless, the word as judicially adopted is not so narrow as to exclude damages for the loss of services of the husband, wife, or child, and, when the beneficiary is a child, for the loss of that care, counsel, training, and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.

In *Tilley v. Hudson River R. Co.*, 24 N. Y. 471, and 29 N. Y. 252, 86 Am. Dec. 297, the Court stated that "the word 'pecuniary' was used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most painful and grievous to be borne, cannot be measured or recompensed by money. It excludes, also, those losses which result from the deprivation of the society and companionship, which are equally incapable of being defined by any recognized measure of value."

To the same effect are the cases of *Schaub v. Hannibal & St. J. R. Co.*, 106 Mo. 74, 16 S. W. 924, which was followed by the Circuit Court of Appeals for the Eighth Circuit in *Atchison, T. & S. F. R. Co. v. Wilson*, 1 C. C. A. 25, 4 U. S. App. 25, 48 Fed. 57; *Lett v. St. Lawrence & O. R. Co.*, 11 Ont. App. Rep. 1; *Pennsylvania R. Co. v. Goodman*, 62 Pa. 329, 339; *Louisville, N. A. & C. R. Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010; *Tiffany, Death by Wrongful Act*, secs 154 to 162, inclusive; Patterson, Railway Acci. Law, secs. 401 to 406.

No hard and fast rule by which pecuniary damages may in all cases be measured is possible. In *Lett v. St. Lawrence & O. R. Co.*, cited above, it was said in the opinion of Patterson, J.A., after a review of all the English cases construing the act of Lord Campbell:—

"That there is through them all the same principles of construction applied to the statute. Each fresh state of facts as it arose was dealt with, and furnished a further illustration of the working of the Act. The party claiming was held to be entitled or not to be entitled, the scale of compensation acted upon by the jury was approved or disapproved, in view of the immediate circumstances; but in no case has it been attempted to decide by anticipation what are the limits beyond which the benefit of the statute cannot be claimed."

The rule for the measurement of damages must differ according to the relation between the parties plaintiff and the decedent, "according as the action is brought for the benefit of husband, wife, minor child or parent of minor child, for the loss of services or support to which the beneficiary was legally entitled, or is brought for the benefit of a person whose damages consist only in the loss of a prospective benefit to which he was not legally entitled." Tiffany, *Death by Wrongful Act*, secs. 158, 160-162.

The Court below instructed the jury that they could not allow damages for the grief and sorrow of the widow, or as a "balm to her feelings." They were directed to confine themselves to a proper compensation for the loss of any pecuniary benefit which would reasonably have been derived by her from the decedent's earnings. The Court did not stop there, but further instructed the jury that, "in addition to that, independent of what he was receiving from the company, his employer, it is proper to consider the relation that was sustained by Mr. Wisemiller and Mrs. Wisemiller, namely, the relation of husband and wife, and draw upon your experiences as men, and measure, as far as you can, what it would reasonably have been worth to Mrs. Wisemiller in dollars and cents to have had, during their life together, had he lived, the care and advice of Mr. Wisemiller, her husband." [189 Fed. 496.] This threw the door open to the widest speculation. The jury was no longer confined to a consideration of the financial benefits which might reasonably be expected from her husband in a pecuniary way.

A minor child sustains a loss from the death of a parent, and particularly of a mother, altogether different from that of a wife or husband from the death of the spouse. The loss of society and companionship, and of the acts of kindness which originate in the relation and are not in the nature of services, are not capable of being measured by any material standard. But the duty of the mother to minor children is that of nurture, and of intellectual, moral, and physical training, such as, when obtained from others, must be for financial compensation. In such a case it has been held that the deprivation is such as to admit of definite valuation, if there be evidence of the fitness of the parent, and that the child has been actually deprived of such advantages. *Tilley v. Hudson River R. Co.*, and *Lett v. St. Law-*

rence & O. R. Co., both cited above. If the case at bar had been of such a character, the loss of "care and advice" might have been a proper matter for compensation.

Neither "care" nor "advice," as used by the Court below, can be regarded as synonymous with "support" and "maintenance," for the Court said it was a deprivation to be measured over and above support and maintenance. It is not beyond the bounds of supposition that by the death of the intestate his widow may have been deprived of some actual customary service from him, capable of measurement by some pecuniary standard, and that in some degree that service might include as elements "care and advice." But there was neither allegation nor evidence of such loss of service, care, or advice; and yet, by the instruction given, the jury were left to conjecture and speculation. They were told to estimate the financial value of such "care and advice from their own experiences as men." These experiences, which were to be the standard, would, of course, be as various as their tastes, habits, and opinions. It plainly left it open to the jury to consider the value of the widow's loss of the society and companionship of her husband.

In this part of the charge the Court erred. The assignments of error are otherwise overruled. But for this error the judgment must be reversed and a new trial ordered.

STORIES OF ENGLISH LAW AND LAWYERS.

The prolixity of counsel has provoked much good-and-bad-humored interruption from the Bench.

In Mr. Justice Darling's Court a few years ago, counsel, in cross-examining a witness, was very diffuse, and wasted much time. He had begun by asking the witness how many children she had, and concluded by asking the same question. Before the witness could reply, Justice Darling interposed with the suave remark: "When you began she had three."

Of the same genial order was the retort of Justice Wightman to Mr. Ribton, when that counsel, in addressing the jury, had spoken at some length, repeating himself constantly and never giving the slightest sign of winding up.

He had been pounding away for several hours, when the good old Judge interposed, and said, "Mr. Ribton, you've said that before." "Have I, my Lord?" said Ribton, "I as very sorry; I quite forgot it." "Don't apologize, Mr. Ribton," was the answer. "I forgive you, for it was a very long time ago."

With these two creditable specimens of kindly, spontaneous humor, compare the remark of a United States Judge, which was much praised in the press at the time it was made, but which in our opinion is far inferior to Justice Darling's impromptu. The American visited the Court of Appeal, and was invited by the late Lord Esher to take a seat on the bench. A certain Queen's Counsel was addressing the Court. "Who is he?" asked the Yankee. "One of her Majesty's Counsel," replied Lord Esher. "Ah," said the American, "I guess now I understand the words I have heard very often since I have been in your country, 'God Save the Queen.'"

Bethell, afterwards Lord Westbury, confessedly adopted as a ruling principle the maxim: "Never give in to a Judge," and his overwhelming egotism enabled him to successfully carry off situations that would have brought a less fearless man to grief. All his sayings have a touch of bitterness and cynicism, and in reading those accounted most brilliant, one somehow feels that they savor of what might be termed colossal cheek rather than legitimate repartee. "Take a note of that," he once said in a stage aside to his junior. "His Lordship says he will turn it over in what he is pleased to call his mind." The discursive habits of Lord Justice Knight Bruce he detested. "Your Lordship," he once pointedly cut short an observation of that Judge by declaring, "Your Lordship will hear my client's case first, and if your Lordship thinks it right, your Lordship can express surprise afterwards." And all the gratitude that fell to the successful suggestion of one of his juniors was the *sotto voce* remark, "I do believe this silly old man has taken your absurd point."—*Central Law Journal*.

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TRUSTS AND THE LAW.¹

The last chapter in the history of industrial development should be entitled "The Trust." As a force regulating the production of commodities, their transportation and their distribution, the Trust constitutes the last word. It represents the perfection of industrial organization.

It is not possible to trace here the history of industry in its slow and painful progress from prehistoric times. In a word it is the history of the victory of the principle of co-operation over that of isolated individual effort. Mankind was slow in learning its lesson. Countless centuries separate the needle, laboriously fashioned by the cave-man out of a piece of ivory or bone, from the machine-made steel needle turned out by the million in a modern factory, after undergoing a dozen or more processes at the hand of a dozen or more operatives. Of the various stages through which industry passed, before this principle of co-operation, which culminated in the modern industrial system, was recognized and applied, it is unnecessary to treat in detail. It must suffice to state that the Trust is the natural product of industrial evolution, and became possible only when the production of commodities was carried on under the factory system, transport highly developed, and communications quickened. At the same time, it must not be forgotten that without concentration of industrial concerns the development of transportation and communication would not have taken place so rapidly or to anything like the same extent. These forces are interdependent.

¹ *Concentration and Control. A Solution of the Trust Problem in the United States.* By Prof. C. R. Van Hise. New York: The Macmillan Company. 1912.

What then are the economic advantages of the concentration of industry? What is the economic value of manufacturing commodities with a large plant and doing business on a grand scale? Industries, of course, differ in character, and any general conclusion may require modification when tested by a particular case. Professor Van Hise, President of the University of Wisconsin, has summarised in his recently published work, *Concentration and Control*, the economic advantages of concentration of industry as "the subdivision of labour, the full use of mechanical appliances, the specialisation of departments, integration (i.e., the handling by one company, not only of one stage of manufacture but of a number, or even of all the stages from the raw material to the finished article), utilisation of by-products, entrance into allied industries, distribution of plants of the same kind, using only the most efficient plants, maintenance of investigating departments, economies of business management, and reduction of amount of capital."

These advantages are so great that they are not open to question. And they are so obvious that the public hostility to the Trust in the United States, and to a lesser degree in this country, would be incomprehensible were it not for the fact that the object of the Trust is twofold. This object is not only the lessening of the cost of production, but the maintenance and enhancing of prices by the control of the market. This control can only be complete when the Trust has become a monopoly, and it is attained when production can be effectively limited.

The problem for solution is not whether the advantages of concentration outweigh the disadvantages or *vice versa*, but whether the Trust cannot be retained free from the disadvantages. To destroy the Trust is to destroy the most efficient instrument of production the world has hitherto devised. It would throw back the industrial system into the chaotic competitive stage from which it has already largely emerged in the United States, and is in process of emerging in this country. In the former country the question has already reached an acute stage. It is a question of practical politics. There, the question has largely resolved itself into the alternative of the destruction of the Trust, regardless of its obvious economic advantages or of its control by legislation.

As it is in the United States that the Trust has attained its greatest development, and it is there that the most serious attempts are being made to control its operations by the Legislature, any discussion of the problem would be incomplete and inconclusive which omitted from its purview the history of the Trust in the United States.

The comparatively early appearance and unusually rapid growth of the Trust in the United States must be attributed to the effects of the Civil War. The combined forces of the North and South in the field at one time numbered more than a million and a-half troops; whilst in the North a great naval power was created. The small and isolated industrial concerns were incapable of supplying the materials and munitions of war in sufficient quantities and in the required time demanded by the authorities. This demand was met by the large factory, which in turn gave tangible proof of the value of co-operation on a large scale. It was perceived that through the use of a multitude of men under one organisation a given big result might be reached at a definite time and place. Thus, as Professor Van Hise states, "One of the most far-reaching effects of the Civil War was the acceleration of concentration under the tremendous necessity to do things on a great scale."

Of other influences contributing to the acceleration of concentration in industry the most important may be mentioned. These are the joint stock company, the protective tariff, railway rebates and drawbacks, local underselling, patents and trade-marks, and manufacturers' rebates.

The first has rendered possible that enormous capitalisation which is the outstanding feature of the Trust. It has been somewhat hastily assumed in Free Trade circles in this country that Protection is responsible for the Trust. This, of course, is incorrect. What Protection really does is to eliminate one factor in competition, viz., the foreign competitor, and also to enable the home producer to sell commodities as high as the tariff permits and the home markets will bear, and to dispose of his surplus in the foreign markets at a lower rate. The secret arrangements under which railway companies conceded rebates and drawbacks to the great industrial concerns, potent as they formerly were in the concentration of industry, have within recent years ceased to operate, and may therefore be dismissed from consideration. Local underselling is another powerful

factor in promoting concentration, and has very largely prevailed in the United States. This immoral practice is not wholly unknown in our own country. The control of patents naturally favours concentration, and where a particular patent is essential to the manufacture of a given article, a complete monopoly is created. For instance the United Shoe Machinery Company controls all the patents used in the manufacture of machines necessary for the cheap manufacture of shoes. These machines the company refuses to sell; it merely hires out the machines to other manufacturers. By this method it is enabled to absorb or drive out all competitors. Finally, the practice of large manufacturers giving a rebate to buyers upon the list price at the end of a given period, provided they have purchased exclusively from them, has proved a highly-successful means of securing the market and maintaining or enhancing prices. This policy has been extensively followed by the American Tobacco Company.

As already stated, the object of concentration was twofold. The one, the lowering of the cost of production; the other, the maintenance or enhancement of prices. But it was soon found that the concentration of an industry, or a number of allied industries, in the hands of several independent groups, was impossible in practice. Under the keen competition which ensued, prices were cut so as to lessen profits to a minimum, and frequently to wipe them out altogether, or even convert them into a loss. Such a situation could only be saved by a combination of the groups in one large Trust. "Among the causes which have led to the formation of industrial combinations," reported the Industrial Commission in 1900, "competition, so common, so vigorous, that nearly all competing establishments were destroyed, is to be given first place."

In spite of popular faith in the efficacy of the law of competition, long regarded by Anglo-Saxon opinion as the bulwark of industrial liberty, competition has been eliminated in the great manufacturing industries. And although concentration has not yet gained predominance in transport and distribution, competition has largely broken down, and its complete elimination is only a question of time. In the retail trade in the United States, competition in prices for standard articles has ceased to exist between shops of the same class in the same community. In Great Britain, this

process is even more marked, owing to the rapid development of the great stores and co-operative societies, whilst pooling arrangements between the railway companies have practically eliminated all effective competition and paved the way for ultimate and inevitable amalgamation.

Moreover, competition, invaluable as it undoubtedly was in a former stage of industrial development, is deservedly perishing because it has failed to secure for the consumer the control either of the quality or the price of commodities. Under modern conditions its effect has been, speaking generally, both to lower the quality and to cause greater distress by irregularities in prices.

To these disadvantages must be added the waste of the competitive system. And it is the consumer who ultimately has to pay all the losses and wastes, the cost of which is added to the price he pays for everything he buys. As Nettleton points out: "The waste of wealth due to unrestrained competition would, if saved, go far to enrich the community every year. And this waste finally falls for the most part on the general body of consumers—the much-enduring public."²

It is now recognised by leading economists and by the general body of traders and manufacturers, that unrestrained competition as an economic principle is too destructive to be permitted to exist. Under modern conditions, business men must either co-operate or perish. With this alternative before them, co-operation is inevitable. Moreover, it is in accordance with the natural evolution of industry. The result is that these men, conscious as they are that they are breaking the law, feel no moral guilt. Combination is practically universal. Here and there an individual is selected for prosecution. But the deterrent force is very small. Like soldiers on the field of battle, all hope that the blow will fall elsewhere. With this general violation and sporadic enforcement of an impracticable law, respect for the law becomes blunted, not only in one respect, but generally. And this loss of respect is inevitably accompanied by loss of moral responsibility. Labour conditions in the United States are a striking illustration of this absence of the moral sense.

² *Trusts or Competition*. Cited by Professor Van Hise.

We must now proceed to examine the laws regulating industrial combinations. These laws have followed the same course of development as in Great Britain, where freedom to combine in trade to any extent, provided the combination were not immoral, unlawful or oppressive, were not contrary to public policy and were not a monopoly, had become legalised. This freedom to combine was as fully recognised as freedom to compete.

The limits of the combinations which were within the law in the United States prior to the anti-Trust legislation have been summarised as follows:—

(1) Any combination of corporations or individuals, the object of which is, or the necessary or natural consequence of the operation of which will be, the control of the market for a useful commodity, is against public policy and unlawful.

(2) Any combination of quasi-public corporations, the object of which is, or the necessary or natural consequence of the operation of which will be, the increase of charges beyond reasonable rates or the curtailment of facilities afforded the public, is against public policy and unlawful.

Under these principles, combinations which had for their object maintenance of a fair price, union of rival manufacturers, agreements in selling price or division of profits and exclusive trade agreements, were deemed lawful. But whilst great liberality was shewn to combinations and agreements in restraint of trade, when such agreements and combinations affected partnerships or corporations, they were declared to be illegal.

The first Trust case to come before the Courts was that of the *People v. The North Sugar Refining Company*.^a Hitherto I have spoken of the Trust generally. Its technical meaning must be more closely defined. Under the Trust, each unit of the combination transferred its stock to trustees. The entire stock was thus held by a group of trustees who had complete authority over the business of all the companies forming the combination. Each unit, however, retained its own officers, who conducted the business as an independent concern, with this most important exception. In all matters affecting the line of product, amount of output, and price, they were subject to the direction of

the trustees. The Trust was thus enabled to limit the output, to prevent competition in price so far as its own units were concerned, to apportion business, to consolidate buying and selling, and so gain all the advantages due to concentration of industry.

In dissolving the North Sugar Refining Company, which was a combination with the above definition, the Court held that the acts of the Trust were unlawful for two reasons: "1. They constitute the corporation a partner, and a corporation is not allowed by law to enter into partnership. 2. Any combination, the tendency of which is to prevent competition in its broad and general sense and to control and then at will enhance prices to the detriment of the public, is a legal monopoly and is against the public interest."

Upon similar grounds the Standard Oil Trust of Ohio shared the same fate, and numerous decisions followed which declared that combinations going to the extent of monopoly were contrary to public policy, as intending to control the market.

Notwithstanding these decisions, a large measure of liberty remained.

Suddenly, in 1890, a new policy severely restricting combinations was inaugurated by the Sherman anti-Trust law. Combinations hitherto regarded as legitimate were, by the Act, so far as inter-state commerce was concerned, declared illegal. Similar legislation regulating intra-state commerce followed in most of the States of the Union.

Secs. 1 and 3 of the Sherman Act make "every contract, combination in the form of a Trust or otherwise, or conspiracy in restraint of trade or commerce," illegal. This provision applies as among the several States and Territories, the district of Columbia and foreign countries; as between persons, corporations, and associations engaged in inter-state commerce; and as between one of any of these groups with any member of another group, except contracts between two foreign countries.

Sec. 2 provides that "every person who shall monopolise or attempt to monopolise, or combine or conspire with any other person or persons, to monopolise any part of trade or commerce among the several States or within foreign countries shall be deemed guilty of a misdemeanor." Thus the law forbids both restraint of trade and monopoly or attempt

at monopoly. Violation of any of the above provisions of the Act is made a misdemeanor, and is punishable by a fine not exceeding \$5,000 or imprisonment not exceeding one year or both.

Sec. 7 provides that any person who is "injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this Act . . . shall recover threefold the damages by him sustained and the cost of suit, including reasonable attorney's fee."

Subsequent amendments have extended the inhibition of combinations to importers.

Under these statutes many cases came before the Courts. The earlier decisions were singularly ineffective. There were of course some exceptions. For instance, the Northern Securities Company was declared to be in restraint of trade. This was what is known as a "holding company." It possessed the whole or the bulk of the stock of several railways. This decision has raised the question of the legality of the great holding companies formed for the purpose of controlling the market in the shares of other companies or of controlling the businesses of other companies in the sole interests of the holding company.

In more recent years the Courts have gone still further in their attempts to restore the principle of competition, and in their interpretation of the provisions of the Sherman Act, have gone a long way to reintroduce the Common law relating to combinations and contracts in restraint of trade. The decisions declaring the Standard Oil Company and the American Tobacco Company illegal combinations were of a sweeping character. By these decisions both companies were reduced to their constituent units. The former was broken into thirty-eight companies, with separate officers or directors. The two hundred and fifty or so units of the tobacco combine were allowed to be reconstituted in fourteen companies, three of which possessed 70 per cent. of the original capital of the company.

The object of the Government was announced by President Taft to be to secure "a degree of disintegration by which competition between its parts shall be restored and preserved." How far is this object likely to be obtained? In the opinion of the Attorney-General these decisions will effectually prevent the recurrence of agreements which in

the past have resulted in a monopolistic situation. "The natural tendency of men to compete with one another will," he declared, "operate, and the fact that there is community of stockholding cannot prevent that natural tendency."

But, as we have laboured to point out, the natural tendency of men to co-operate is much stronger than their tendency to compete. In spite of such disintegration as already described, the two companies are carrying on the same businesses as if nothing had occurred. The law may break the form, but it cannot kill the spirit. The attempt to destroy trade combinations has failed, as it was doomed from the first to failure. The Standard Oil Company has ceased to exist in name, and its business is now carried on by thirty-eight so-called independent companies; but does any one seriously believe that these companies are in any sense competitors? Trusts may be disintegrated by the law, "but in their places," as one writer declared, "you have associations for the betterment of trade, &c.; there are any number of dinner and luncheon clubs, and reunions, and general understandings, winks and telephone messages, that are far more difficult to get at."

That the law has failed is shewn by the opinion of the market. Whilst the case of the Standard Oil Company was before the Courts, the stock fell to 585 dollars per share. After the decision it rose to 900. Similarly the stock of the American Tobacco Company fell to 390, only to rise, after its dissolution, to its highest point but one in the history of the company, viz.:—529 dollars per share.

A further development of the Trust, designed to evade the provisions of the Sherman Act, is a combination known as "the complete merger." The stock of the constituent companies of the combination is brought in and cancelled, the shareholders receiving in exchange an equivalent amount of stock in the new combine. The great merger has already become the subject of attack in the Courts. The Diamond Match Company, for instance, which bought up competing concerns in the manufacture of matches, has been declared an illegal monopoly in the State of Michigan. This attack on intra-state commerce will, no doubt, be extended to interstate commerce. Whether such attacks will be any more successful remains to be seen. After twenty years of attempted suppression by legislation, the only effect has been

to change the forms of combination. The informal agreement has given way to the pool; the pool to the trust; the trust to the holding corporation; the holding corporation to the complete merger. And during this process in the development of the larger industries, hundreds of informal associations of precisely the same kind have arisen, such as fruit growers' associations, butter makers' associations, &c.

It is true that many abuses of the combine have been stopped; many unfair practices have been eliminated. But the main object of this repressive legislation has failed. There has been no gain in preventing combinations in restraint of trade. The Sherman Act has proved impotent to destroy combination and co-operation, and it is clear that further attempts in the same direction will be equally futile.

Under these circumstances, what is the remedy? Admittedly concentration in industry has come to stay. It is the most perfect system of industrial organisation yet devised, and it is a natural development. To destroy it would be the height of folly, and yet to allow it to remain uncontrolled is impossible. It would prove a tyrant, compared with which the despots of old would appear but pale shadows.

The remedy advocated by Professor Van Hise and his school is public control. Already in the field of public utilities, such as transport and municipal services, public control has been obtained. During the last twenty years a sound development in the control of public utilities in the States of the Union has taken place. This course has been followed by the State Government, which, by the Inter-state Commerce Act of 1887 and the Amending Acts of 1906 and 1910, have instituted a system of control for inter-state commerce, applying to all common carriers and public utilities. An Inter-state Commerce Commission has been created with powers to supervise all questions of rates and charges and services. Other commissions have been appointed to secure the proper quality of commodities in the interests of public health. Most of the States have instituted commissions or boards to deal with adulteration of foods, drinks and drugs. A pure food law was passed for inter-state commerce in 1906.

Upon the whole, the results of this system have proved so satisfactory that Professor Van Hise urges its extension to the big industries with a view to fixing prices. Regarding concentration as inevitable with its attendant high prices, he maintains that the only protection for the public is regulation

by the State. Such regulation is, he conceives, best attained through commissions vested with authority to place maximum and minimum prices at reasonable levels. As Attorney-General Wickersham has stated: "If we permit the existence of organizations or combinations of producers under such conditions that they can fix prices, there is no means of securing justice to the consumer except through the Government asserting its right to step in and dictate prices, or, at least, to require that they shall not be raised above reasonable limits."

In Great Britain the Trust has already taken root, following the same line of natural development as in the United States. But hitherto the evils of the system have not been seriously felt.

In the first place, the doctrine has been fully accepted by the Legislature and by the Courts that freedom in trade gives freedom to combine as well as freedom to compete, provided the combination did not result in monopoly. Consequently, extensive combination and co-operation has grown up in almost every line of industry in Great Britain. But not being driven from one position to another by prohibition of combination, the movement toward giant holding companies or mergers has not been so far-reaching as in the United States. Such combines as exist operate through co-operations and federations rather than through mergers, although in a number of cases consolidation has gone far; but there are few industries in which a single combination controls more than half the business. Secondly, the Trusts are unable to enhance prices to the same extent as in the United States and other protective countries owing to our Free Trade system. And thirdly, public utilities, services such as drainage, water, gas, electric light, tramways, baths and wash-houses, libraries, &c., have been municipalised. Telephones have lately been added to those services, such as the post office and telegraphs already administered by the State. The control over transport exercised by the Railway and Canal Commission has not proved so satisfactory as to lead to any demand for the extension of that system to other industries. But the institution of a minimum wage for miners may prove the commencement of the adoption of the system advocated by Professor Van Hise. In the case of transport, nationalisation of railways appears to be only a question of time. If the principle of co-partnership, which is advocated in influential quarters should become popular, it would minimise the evils

of concentration to some extent. But with the evolution of national Trusts to world Trusts, which has already commenced, we are confronted with a far more intricate problem. This would appear to necessitate an international commission for the purpose of controlling prices.

At the present moment, however, there is no immediate necessity to institute legislation in Great Britain for the control of the Trust, owing to our Free Trade system and our state and municipal ownership of public utilities.

But the time will come, and it may not be so far off as is commonly supposed, when the power of the Trust, national or cosmopolitan, will force itself upon public attention with no uncertain sound. The general situation has been summarised by Macrosty as follows:—

“The position of the British combinations in regard to the interests of the community may be summed up as not at present dangerous, but containing, like every new development, great and unknown possibilities alike for good and for evil. Over prices their powers are not great but are growing. So far they have shewn no increased power over their employees, and with a strong trade union they need not have.”⁴

Combinations which confine their operations to Great Britain are fully alive to the weakness of their position owing to the free admission of foreign competition. They are obviously at a great disadvantage compared with combinations in countries where their commodities are sheltered behind a tariff wall, since the excess products of foreign competitors can enter Great Britain without payment of duties, whereas British excess products cannot enter protected countries without scaling the wall. This situation has already resulted in the formation of a number of international combines centred in or conducting business in Great Britain. Of the more successful may be noted the Imperial Tobacco Company with a capital of £17,500,000, the limited Alkali Company with a capital of £8,200,000, W. Cory & Sons Coal Company with a capital of £2,800,000, J. & P. Coates Thread Company, The Nobel Dynamite Trust Company with a capital of £3,000,000, and the International Steel Rail Company.

One of the latest Continental combines is the “*Union Continentale Commerciale des Glaceries*.” The main pur-

⁴ *The Trust Movement in British Industry*, p. 342.

pose of this scheme is to centralise in Brussels the commercial services of all the continental plate-glass works, and to form a "*comptoir de vente*" of the industry, in order to suppress all competition, not only in respect of prices and conditions of sale, but also as to conditions of packing and quality of plate glass. It consists already of 13 companies, of which 5 are Belgian, 1 Dutch, 3 French, 1 Austrian, and 3 German.⁵ Should these operations be extended to Great Britain and an effective world monopoly established, it is obvious that our free trade system would prove no bar. Even if such a combine were declared illegal by English law, so far as the English unit of the combine was concerned, any such decision would be ineffective. As Professor Van Hise rightly maintains, "no law can suppress the gentleman's agreement, where there are no rules, no constitution, no contract, but common action is effected verbally and informally." Some of the most oppressive combinations have been of this character. Neither combination nor agitation should be driven underground. It is significant that the loudest complaints in Great Britain are raised not so much against the legally recognised amalgamations as against associations which have no existence in the eye of the law and work in secret. "To strike" says Macrosty, "at the methods adopted by combinations is not easy without at the same time repressing measures blamelessly adopted by the individual trader. Boycotting, dumping, selling at a loss to crush competition, maintaining prices at the highest level which the market permits—these are no monopoly of combinations, but are weapons in every-day use by manufacturers, merchants, and shopkeepers. It would be indeed an extraordinary thing to strike a competition in the name of competition."

To legislate in a panic, regardless of economic conditions due to natural developments, would be fatal. It cannot be stated too often or too emphatically, that these great amalgamations are the best instruments for production of commodities, their transportation and distribution, and for the supply of public services devised up to date. To attempt to break them up into their original units would be foolish, were it not in many cases impossible. "Crude methods of suppression," says Macrosty, "are always wrong, nor does it seem sensible to search among legal principles relevant

⁵ *The Times*, Jan. 22, 1913.

to a different stage of industry for weapons to hamper and obstruct."

But if the time is not ripe for legislation, it is surely time for a close inquiry into the workings of industrial combinations in the United Kingdom. A Royal Commission would elicit evidence which would awaken public opinion to the magnitude of the evils, and the vital importance of discovering some effective method of protecting the interests of the consumer and the general public.

In the meantime, we shall be wise if we carefully note the march of events in the United States and on the Continent, taking full advantage of the lessons to be derived from a study of the economic conditions attending industrial concentrations in the United States and elsewhere, and of the attempts made by the Legislature to remedy the evils inseparable from that system under the economic conditions which now prevail.

JURIS CONSULTUS.

INTERLOCKING CORPORATIONS.

Once more a striking phrase has suddenly become a part of our everyday speech and with it a cause, though it is as yet a more or less indefinite cause, has found a measure of prosperity. It is an effective phrase, one in which an advertising agent or a seeker of political catch words must take a pure delight. "Interlocking directorates." You do not have to hear it often to find yourself thinking of the boards of directors of many of the big corporations in the land as mortised and fitted to work in perfect unison—an interlocking, interchangeable, intercorporate marvel of the joiner's art. Nor does the imagination far outstrip the facts. In every city of any size how many interlocking corporations are there? How many are there in the big cities; some of State-wide importance, some of national or even international influence?

The Steel Corporation, for example, is a morsel to roll under any man's tongue. Here is the way it impresses one militant journalist:—

"The Steel Trust's advantage over competitors of three dollars a ton in cost of production, due not to superior effi-

ciency but to the ownership of certain strategic railroads and steamship lines, is greatly enhanced by its relations to many other carriers. The few men who control the Steel Corporation are directors also in twenty-nine other railroad systems, with 126,000 miles of line—more than half the railroad mileage of the United States—and in steamship companies. These men are also directors in twelve steel-using street railroad systems, including some of the largest in the world; they are directors in forty machinery and similar steel-using companies; in many gas, oil, and water companies, extensive users of iron products; and in the great wire-using telephone and telegraph companies. The aggregate assets of these different corporations exceed sixteen billion dollars. Sixteen billion dollars is more than twice the assessed value of all the property of New England. It is more than one and one-half times the assessed value of all the property in the thirteen Southern States. It is larger than the assessed value of all the property in the twenty-two States, north and south, lying west of the Mississippi river, except only Texas.”¹

Interesting, even startling, but in a measure misleading, if these great properties are considered as being under a common control. The common control extends to a considerable part of them; with the others this relation means little more than ease of intercommunication or ability to respond quickly to a common impulse, for a common benefit or defense. On the other hand, the Steel Corporation is not the only sun with satellites in the American sky. There are several others.

However, the new-found phrase has proved in a measure tyrannical. As is so often the case with such phrases, being a catch-word it has bred impulsive judgment—it has turned attention to one side of a big problem and has effectively excluded most others. First, it has begged the question—it has created an assumption that interlocking directorates are in and of themselves undesirable. But this might be indulged, if it had not so totally obscured the big questions that lie just behind. Directors, after all, are merely the agents or trustees of corporations. A corporation's owners are the principals. Its big stockholders—and yes, begging leave, its

¹ In *Collier's Weekly*, Oct. 5th, 1912. Compare the testimony taken by the Pujo investigating committee of the House of Representatives, especially that taken on Dec. 18th, 1912.

little ones—are the men behind the guns. If interlocking agents are anathema why not interlocking principals? Yet the question of common ownership is as effectively obscured as though it were almost non-existent.

The problem is more than this. Indeed it is not one but several problems. The question of intercorporate directorates, it must be granted, is a question of importance. But it is indissolubly connected with several others. The questions of intercorporate contracts, of intercorporate combinations, consolidations, leases and sales, invite thought in which the intercorporate directorate may be but incidental, a background shadow. And brooding over all is always the question of the interlocking ownership of these corporations, the interfinancial hegemony, which can no longer be obscured. Moreover each and all of these problems has two sides. Public and private interest differ and are not the same. Intercorporate directorates, intercorporate ownership, contracts between corporations having common directors or ownership, may signify one thing from the standpoint of a minority stockholder, another from that of the majority stockholder, and still another from that of the public. And all of these questions may in turn be qualified or entirely metamorphosed by the nature of the business in which, as it happens, the particular set of interlocked corporations under examination is engaged. If the corporations are small or middle-sized merchandising corporations, the consuming public may be specially exercised at their real or imagined practices. If they are industrial corporations, labor will be particularly alert to all their doings. If they are public service corporations, they will always entertain a medley of interested inquisitors—a little bit of this, that and the other thing. If they are corporations of the secret process brand, or if they are close corporations, or if they are in any sort of business in which reticence is something more than good manners, they may experience one sort of thing—which may sometimes prove very painful—whereas if they are corporations of the banal, open-to-everybody kind, or the kind that has an assured monopoly, a perpetual franchise, and stock and bonds all listed on the stock exchange, the experience may, as a rule, be quite different. A little more discrimination than we have had thus far in the interlocking directorate controversy—which doesn't quite cover everything in the trust and corporation question—may prove helpful.

Most of all, differentiation would be welcome in dealing with the concern of the stockholder on one hand, that of the public on the other. Obvious as the need of this may seem to be, it has been somewhat lacking.

The stockholder's interest in the corporation is that of a property holder, his relation to the director is that of one of several joint owners of property to their representatives and managers—representatives and managers who have very full powers indeed, who can help the stockholder or hurt him beyond repair. The stockholder's prime concern is that the director shall work always and all the time for the corporation, for that means he will work for the stockholder. The director may be, and if he is a big man in the business world, he is likely to be, a director in other corporations, perhaps in several of them. That of itself may mean nothing of importance to the stockholder. The corporations in which the director is interested as director may never come into commercial contact with his own, or their contact may be in its effect neutral or even beneficial. But once the director is interested as director in a competing corporation, or in a corporation which performs a service or produces a commodity or possesses property which the other corporation desires to buy, then the situation changes immediately. The director is at once in the position of one who seeks to serve two masters whose interests are or may easily become more or less conflicting and antagonistic. Can he maintain a perfectly even balance? Will he dot every i, cross every t, do equity like a Solomon? When contracts are made between the two corporations is there not danger that he will give one of them the better of it? The danger is a very real one, and the opportunity presented has tempted many men in just such situations to do gross fraud.

Perhaps it will be said that the stockholder has himself to blame if he permits conditions which make such discrimination or dishonest dealing easy. That would be true if the stockholder's position were that of the ordinary employer or owner. But this is not the case. While in certain respects his rights and powers are like those of such an employer or owner, in others they are entirely unlike them. Unless he owns a working majority of the stock himself he cannot say who shall be the directors; he cannot say that a part or even all of the directors chosen shall not hold like positions in one or a dozen

other corporations, any or all of which may be competitors of his own corporation; there is as yet practically no positive law against intercorporate directorates, intercorporate principals or intercorporate contracts between such directorates or principals. What means the stockholder has to protect himself are curative rather than preventive.

And there are impediments—sometimes exceedingly difficult to overcome—even in the way of administering the cures. Nowhere perhaps is this better illustrated than in the existing state of the law concerning the stockholder's right to inspect the books and papers of the corporation. It is laid down as a broad general proposition that one of the privileges incident to stock ownership is that of inspection of the books and papers of the corporation, and that this privilege in general becomes a right "when the inspection is sought at proper times and for proper purposes." In many of the states this right has been expressly guaranteed by statute, in some by the constitution—but the right, such as it is, exists at common law, independent of legislative act or constitutional guarantee. Such as it is. For as a general thing it is a right which can be availed of only with difficulty even when the exercise of it seems almost imperative. In ordinary relations it often seems practically impossible to assert it effectively. Some Courts have been more liberal than others in permitting examination of the corporation's books and papers by the stockholder. In certain cases the privilege has been granted when the only purpose of the stockholder appeared to be to acquire information to enable him to vote intelligently. But no one who looks into the matter can fail to be impressed with the character or apparent number of the instances in which the privilege has been refused. The corporation may cease to pay dividends; the market value of its shares may greatly decrease; the officers may discontinue their reports to the stockholders; the directors may decide to lease or dispose of a part of the property; they may decide to bring suit against one or more of the stockholders. In such cases the stockholder's anxiety will be very real and the only ways in which it can be allayed will be through the assurances of officers and directors whom he trusts or by an examination of the condition of the corporation itself. Yet in cases of precisely this character stockholders seeking information have gone away empty handed, and the Courts have refused relief.

Overmuch stress of course is not to be placed upon this condition of affairs. A fair balance must always be maintained. A corporation is a business enterprise and like most business enterprises it has a business privacy which cannot be invaded and business secrets which cannot be divulged without injury to the stockholders themselves. The director as a trustee of the corporation—and he is a trustee of the corporation first, of the stockholder only secondarily—is often under obligation to preserve these secrets even against the stockholder himself. These secrets may be secrets of process in manufacture; specialized and therefore more or less secret knowledge of markets, of when to buy or to sell to the best advantage; but they may also to some extent—to a reasonable extent—be secrets of business condition. It may for a time be as important to a corporation to keep its competitor in the dark concerning its profit and loss account or its borrowing power as it is to keep from that competitor all knowledge of the ingredients entering into the thing it sells. But admitting all this, the privilege of non-communication can easily transcend the bounds of fairness to the stockholders. It can easily be made to cloak a scheme to deceive the stockholder as to his holdings, to help directors working for their own private pockets or for their underground financial prestige. It is a sinister privilege at the best.

When with a stoutly claimed privilege of silence, of non-communication, there co-exists a situation facilitating and inviting intercorporate relations or contracts or alliances which may easily prove to be to the detriment of stockholders in one or more of the corporations concerned, who can doubt that the privilege should be subject to the closest scrutiny, that the presumptions of the law should favor the stockholder and lodge the burden of shewing fairness upon the shoulders of the directors? Who can doubt that all contracts made between such corporations where the common directors of all constitute an acting majority or a powerful influence in each should be strictly voidable and that it should be possible for a very minor stockholding interest to set in motion the machinery which would determine whether the contract was fair or prejudicial?

What the law has accomplished in this respect and what it may yet incline to accomplish deserve consideration and careful study. It will be found that the Courts have made much more than a beginning, that they have recognized and

often protected the infirmities of the stockholders even if they have not often taken those final steps which would make the stockholder quite independent in his dealing with the corporation.²

A very few Courts have held that contracts between corporations which have common directors—under certain conditions at least—are void. Usually, however, in such cases the true reason why they have been held void is that the transaction was fraudulent. A considerable number of Courts are to be found at the other extreme. They hold that the contracts are valid, but usually they say that they are subject to strict scrutiny and must be fair. But the rule upheld by most Courts is that they are voidable. Some say that such contracts may be avoided “without regard to the question of advantage or detriment,” but the great majority permit avoidance only when in addition to the common directorship some element of adverse interest, agency or fraud is present.

The rule that declares all such contracts void seems oppressive. The rule that declares them valid, on the other hand, is much too liberal. It makes common directors feel that they have free rein, that the presumptions are in their favour. The true policy seems to lie between—where most of the Courts have located themselves. The contracts should be regarded as voidable whenever any advantage has been taken of the stockholders on either side. The utmost good faith should be required of those who make such contracts. And therefore to protect fully the interests of the minority and the individual stockholder does it not seem that the individual stockholder—provided he is not shewn to be a gratuitous trouble-maker—should have power to begin proceedings in the Courts which would lead to avoidance of the contract if any advantage had been taken of him or other stockholders? Then the mere shewing that the two corporations between which the contract is made have common directors should constrain the Court to look into the matter. The Courts have not yet given the individual stockholder or the small group of stockholders adequate powers of interference in such cases. And they have not yet allowed them that freedom in the examination of the books and papers of the corporation without which this right

² Some of the most important phases of this matter are discussed by the writer in an article entitled “The Validity of Contracts between Corporations Having Common Directors,” published in the *Michigan Law Review*, June, 1906.

would often be empty and meaningless. It is in these two directions that improvement can be made—but improvement can be made in them without great difficulty, for the advance lies along a beaten track. There are no trails to blaze.

It follows as a natural conclusion that so far as the private interest—the interest of the stockholder—is concerned, legislation at this time prohibiting interlocking directorates—except in exceptional cases—or interlocking principals, would be premature. It is doubtful whether, from the private point of view alone, such legislation will ever be necessary, provided the Courts take good care of the intercorporate contracts, extending their good offices in the further strengthening of the stockholder's position.

The dividing line between the public and private or stockholder's interest and point of view in this group of problems is sharp. The public question is economic, to some extent political and social; the stockholder's problem is almost entirely one of profit and loss. In a word, the public problem is the anti-trust problem, the problem of competition and combination. It is not intended to discuss the trust question. It may be said at once that what is said here rests upon a belief in the economic expediency and the social advantage of a general competitive regime in which limited competitive combination or co-operation, in other words a reasonable as distinguished from a monopolistic *modus operandi*, is allowed to play a significant but an incidental and therefore subordinate role. The kind of combination or co-operation that is not allowed to block the movement and free development of equal economic opportunity, is but the logical evolution and expression of one form of highly developed competitive efficiency. What bearing then have intercorporate directorates, intercorporate ownership, and contracts between corporations having common directors or owners, upon the question of competition and combination?

It is at once obvious that if two or more corporations have boards of directors so constituted that an acting majority or even a highly influential minority of those on one board are members of the other board or boards these two or more corporations may with great facility be made to work together—almost as though they were one. This assumes of course that they are corporations which in their nature can work together. The presence on a local New England real estate corporation's board of a majority of the directors who con-

stitute the board, let us say, of a corporation engaged in lightering in New York harbor would be utterly without significance. These two corporations would never play into each other's hands, nor could they well take advantage of each other. But where the corporations are of such a kind that between them there could be combination, horizontal or vertical, the presence of common directors becomes of the utmost significance. A railroad needs freight, the freight producer needs the railroad—with interlocking directorates they are often as good as combined. A steel producing company needs ore, an ore producing company wants a good market for its product—give them common directors and often they are more than united, they are almost coalesced. The United States Steel Corporation, the International Harvester Company, the American Sugar Refining Company are all illustrations of vertical combination; and as for illustrations of horizontal combination, they are also found in these companies as they are in a legion of others.

In some cases such combination by the interlocking of directorates will offend public policy. In other cases it may be said to be directly in line with it—as when non-competing railroads are thus combined. The public policy of nearly all our states in the past has favoured the consolidation of non-competing railroads, and common directorates is a promising step toward such consolidation.

But if combinations in unreasonable restraint of trade are to be condemned, then wherever two or more corporations are engaged in practices that are destructive of competition, and it can be shewn further that they have interlocking directorates, the presumption becomes exceedingly strong that they have in effect combined to restrain trade. The interlocking directorate in such cases is the visible symbol of an inward and secret transgression of the law. Should not the fact of common directorates be laid hold of by the law in such circumstances and be used to fasten the presumption of illegal practices upon the corporations concerned? Some would go further, prohibiting absolutely all interlocking directorates in the case of competing corporations. But the rebuttable presumption may prove adequate.

When, in addition to the common directorates, there are contracts in common, or contracts between the inter-

locked corporations, the government's case may usually be considered made. Between such corporations there must usually be such contracts, written or word-of-mouth, or if not contracts then "gentlemen's" or other equally intelligible agreements—so that once the fact of interlocking directorates is established a *subpoena duces tecum* or a rigid cross-examination of the gentlemen agreeing is likely to mean death in the pot.

However, this is not all of the matter. We may pin down the intercorporate contract, we may ventilate the interlocking director, and find ourselves still outside the gates. By example we should tread softly here. We now approach a subject around which some law officers and many other persons have been tiptoeing, much as though they were attendants in a sick room or a sanctuary.

There are of course corporations normally competitive which have interlocking directorates without interlocking ownership. On the other hand there is interlocking ownership without interlocking directorates. A. and B. may own a majority of the stock in corporation No. 1 and a majority of the stock in corporation No. 2, and an influential part of the board of directors of the first corporation may or may not constitute a part of the board of directors of the second corporation. It does not make very much difference. In any case, the problem is about the same. When the corporations have a sufficient number of common directors they will tend to be managed in a common interest. When they lack the common directors but have common owners every director will tend to be either dummy or Good Man Friday. He will know his master's voice and when to heed it.

Interlocking ownership so far has seemed to bear a charmed life. Now there may be good reasons for this. There must be some reason for it. There must be some reason why bills are framed against the agents, the common directors—while the common owners, the principals, are entirely passed by. Perhaps it is because of that commendable spirit of thorough experimentation which bids the wise to make haste slowly; to go ahead, but first to have some idea of the directions. Perhaps it is due to a conviction, conscious or subconscious, that common ownership is not necessarily an evil thing, that the evil lies only in practices that are in unreasonable restraint of trade, and that it is possible to have common ownership and legal practice. In some cases no doubt this is true. But in others it seems

to require a faith in human nature little short of the sublime, and therefore of course sometimes not far removed from the ridiculous. Unless, which seems entirely possible, a combination reconstituted as a combination of common owners may be said to have suffered a sea-change "into something rich and strange" and in its new condition be given a charter of indulgences permitting it to do what before was in violation of the law. Or it may be that interlocking ownership has enjoyed this immunity from attack because of much doubt as to just how far the government can go, constitutionally and practically, in compelling the owners of illegally combining properties to liquidate their properties in part to others. The practical difficulty of a thorough-going measure of this kind would assuredly be extreme, while its constitutional implications might prove most embarrassing.

As a matter of fact all of these things and more must be taken into consideration in any attempt to do justice to the existing state of mind—to its blind side as well as to the side on which an optic nerve is beginning to develop. It was only yesterday, so to speak, that the significance of common ownership was thrown into sharp relief, when the Standard Oil agglomeration emerged from its ordeal of disintegration seemingly more closely integrated, more thoroughly concentrated, more narrowly held than ever before, so far at least as common ownership is concerned. The Standard Oil system stands dissolved and the little shareholders in it own perhaps less than they did before the big shareholders more. Genius itself could not have contrived a scheme better adapted to the automatic and perfectly noiseless elimination of the little fellows.

It is perhaps not to be wondered at that the political physician still remains transfixed, that the lips of the prophets are dumb—though of course there is no big surprise without its sequel. It may be that we have some preliminaries of the sequel already, in the Union Pacific-Southern Pacific decree. How far-reaching the principles enunciated in that decision may prove to be remains to be seen.

Moreover the anti-trust evolution is just now at a point—and, must it not be said, a healthy one?—where most attention is directed to practices, to acts, to deeds; to the nature and the incidence of those things which tend to throttle healthful competition, and make desert the conditions under which opportunity for men of little means and power

flourishes. We have reached the point where we may hope to see Congress and the government come to grips with realities. Something already has been done. We are on the threshold of this achievement. One or two pushes—how great the misfortune of the pulls backward!—and the government will be straight over the bars, laying about it right and left, at the cut-throat price discriminations, at the stifling of competitors by refusing to sell anything to those who will not buy everything, at monopoly espionage, at fake independence, at any and every similar device. We shall have regulation of competition, regulation of reasonable co-operation, of combination that is not destructive of opportunity, more liberty, and more enterprise.

It is not surprising that with a prospect of being thus engrossed we should not yet have begun to examine very critically the more or less abstract questions of interlocking directorate, or the perhaps even more abstract questions of interlocking ownership.

There is in this an excellent chance of escape for director or owner who in the past has directed or owned to the end that trade might be unreasonably restrained. If he is intelligent enough to take warning from the growing demands for the suppression of practices inimical to a regime of economic freedom and justice—and as director or owner of one corporation can achieve the feat of truly competing with himself as director or owner of the other—he may be allowed to lead his dual and difficult life in all the peace that is economically possible. But if he does not do this—if he lacks the requisite intelligence to do it—he may well beware the bale that is in store for him. For suppose that in the effort to put an end to practices that stifle competition and throttle opportunity, the struggle should seem vain—and largely perhaps because of interlocking contracts, the interlocking directorate of the common owners. Suppose that the men earnestly working for the improved conditions become convinced of that. Does any one doubt what they will do? Will they hesitate to suppress such contracts? The Courts have already shewn the way to do that and in many instances they have done it. Will they stop at the interlocking directorates? The legislatures, state and national, have already entertained some measures of this kind, and at least one of them enacted into law has been most successful. Will they stop even at common ownership? Perhaps there they may pause and look about them question-

ingly, but that they will stop there if the common welfare urges them onward, who will prophesy?

We know that there is a very general feeling among laymen and a certain conviction among lawyers that under our system of jurisprudence there is no way of preventing a man from owning almost anything he pleases and as much of it as he pleases, provided he has the means of acquiring it. But once the demand arises and becomes distinct, a demand of the deliberate majority, we may be surprised at the comparative ease with which the change is brought about—and brought about according to the forms of existing law. To-day many might ridicule any suggestion that through the power of taxation, the power of eminent domain, the "police power," the power to grant and so to limit corporate franchises, or the power to control interstate or intrastate commerce, really practical and effective limitations could be put upon the amount of stocks of a given kind that any man could own. But each of these branches of the law—taxation perhaps the least, the power to restrict corporate franchises and the power to control commerce perhaps the most—contains the seed from which in the fertile soil of judicial construction or extension some hardy plants may grow.

Perhaps the least difficult device for control of interlocking ownership—but one not without many difficulties under our dual government—would be to grant corporate franchises only to those who own no stock or only a limited amount of stock in competing corporations, making this restriction a condition on breach of which the corporation's franchise would be forfeited. No one who realises the tremendous extent of power which Congress has over interstate commerce—how it reaches into details, into incidents but remotely related—no one who has observed the almost furious pace at which this power has developed and is still developing, could be very greatly surprised if out of it there should be evolved far-reaching limitations upon the amount and character of stockholdings in all corporations engaged in interstate commerce, corporations which now include the big manufacturing or industrial corporations with the others.³

³ It may be that the existing Anti-Trust legislation, with some not fundamental changes, will prove adequate to accomplish such an end, should there prove to be a public need for it. Since this paper was written Attorney-General Wickersham's proposition for the regulation of the Union Pacific and Southern Pacific stockholdings—a direct blow to interlocking ownership—has been made.

The time may not yet have come for broad, general laws forbidding intercorporate directorates. For the next few years we seem destined to give most attention to deeds, to the acts that are hostile to our economic and social welfare. It is well that the emphasis is placed there. The energy that seems now behind it might be dissipated, even destroyed, if it were sunk in the abstractions of mere organization. But we shall be fatuous beyond belief if in hammering at deeds we lose sight of these abstractions, for they embrace the real. There are even now certain corporation aggregations which menace the movement against destructive trade practices and agreements, chiefly because of the fact that they are dominated by common directors or common owners. If in any cases the situation is worse than this, if there is beyond a preponderance of doubt a class of corporations in which interlocking management means an inevitable breach of that public policy which has declared for reasonable competition and fair opportunity, there can hardly be a choice. Interlocking management for that specific class of corporations will have to give way or the public policy itself will have to give way.

Large-scale production may be desirable, in some branches of trade it is undoubtedly essential to prosperity. We should do everything possible to mediate between those economic forces which make toward the most efficient units of production and the struggle of individuals for freedom of opportunity, which is even more important. Mediation of course is far removed from dogmatic politics. It puts the emphasis on the facts; condemns the contract between interlocking corporations only when it is contrary to the interests of the private stockholder or offends public policy; condemns interlocking directorates where the facts shew that they should be condemned, and therefore in the absence of sufficient information waits a while before it makes up its mind; condemns the common ownership of competing corporations only when it is demonstrated that neither the surveillance of such corporations, the supervision of their contracts, nor the prescription of their organization has been enough. Mediation, however, is not mere meditation. Its time is now and its method is one of ceaseless activity.

HAROLD M. BOWMAN.

New York City.

THE JUDICIAL COMMITTEE.

CITY OF WINNIPEG V. WINNIPEG ELECTRIC RAILWAY CO.

There were three points involved in this appeal: 1. Had the company a right to make use of the streets of Winnipeg, for the purpose of erecting poles to support wires for the transmission of electric light to customers? 2. The same question as to supplying electrical power. 3. Whether, for the purpose of operation of its own street railway, the company was at liberty to generate power anywhere outside the city limits.

The company had much the better case with reference to the first point. The city was very strong on the second. And the third was doubtful. The city lost all three. Why it failed on the second is a rather surprising story.

The question for discussion was, where did the company get authority to distribute electrical power by means of poles and wires on the streets? The company itself (let us call it company No. 5), had no special charter. It was produced by an amalgamation of two other companies—the Winnipeg General Power Company (No. 4), and the Winnipeg Electric Street Railway Company (No. 3).

The charter of No. 4 gave authority to erect poles for the transmission of power “with the consent of the Council.” No consent had ever been given and none was ever asked. We may eliminate No. 4.

No. 3 by its charter had similar authority subject to the similar condition. Apart from some special permits in connection with supply of power to the city itself, no consent had ever been given and none had ever been asked. We might, therefore, eliminate No. 3, but for what can be urged in connection with transactions which it had with each of two other companies—Nos. 1 and 2.

No. 1 had no charter authority to distribute power. Its charter extended to light and heat only. For those two purposes, it obtained the consent of the city to erect poles and wires. The consent was in the form of a contract, according to which the city was to have the right to use the poles for wires of its own. After operating for some time, No. 1 assumed to transfer to No. 3 all its property, franchises, etc., and from that time onwards No. 3 carried on

the business and greatly extended it. The consent of the city to the erection of poles, however, was always given in the name of the original company, No. 1 (because of the advantages secured to the city in the contract referred to). We may eliminate No. 1 as a source from which the litigating company received authority to distribute power. No. 1 had, itself, no such authority.

One source remains, and everything turns upon its sufficiency. Company No. 2 had authority to distribute power, and with it the city made an agreement similar to the contract with No. 1, that is to say, the city agreed to grant to the company permits to erect poles on the streets, and the company, its successors and assigns, agreed that the city should have certain privileges in connection with the poles. This company too assumed to transfer all its property "and also all franchises, rights, powers, assets," etc., to company No. 3. After that date, no application was made to the city for permits to extend the system, and no permit with reference to power was afterwards issued in the name of No. 2 (the transferring company). The purchasing company (No. 3), however, afterwards without any reference to the city, strung upon the poles which it erected under the permits to No. 1 (given for the purpose of distributing light) wires used in the distribution of power.

Omitting anything that may be said in connection with the conduct of the city from which assent might be argued (because nothing turned upon it¹), we have now before us all the sources from which the litigating company could say that it had obtained authority to use the streets for the transmission of power. Under the charters of its own two component companies, it had no such authority. Any authority which it could possibly have was by virtue of the charter of No. 2, and the transfer from No. 2.

I am not going to argue now that a company cannot assign its charter authority to any other company and that the transfer from No. 2 to No. 3 could not, therefore, have assigned No. 2's charter powers. But for what their Lord-

¹ Upon this point their Lordships said:—"Whether such action on the part of the city, carried on during a long term and with the knowledge of expenditure as referred to, would bar the rights of the city to such an objection against the introduction of power which is at the bottom of all these protracted legal proceedings, need not of course be separately determined, the view of their Lordships on the fundamental rights of parties being as above stated."

ships have said, I should not have thought that there could be any more simple or more fundamental proposition in company law than the impossibility of such a transfer. All I want to do is to point out the way in which their Lordships dealt with the point:

"The appellants are the successors, by amalgamation, purchase, or agreement, of certain companies hereinafter referred to, the general object of whose constitution was for the supply of light, heat, and power in and about the city of Winnipeg by gas or by electricity. This is stating the position of the appellants in the most general terms. It was not denied by the counsel for the respondents that the powers, rights, privileges, and franchises belonging to the respective companies who were predecessors of the appellants have been taken up and carried forward by reason of the various transactions of amalgamation and otherwise, and are now vested in the appellants."

It is to this assertion of the attitude of counsel for the city, that I desire to direct attention.

Winnipeg people were deeply interested in their fight with the company. Many of them understood, fairly well, the legal situation. They knew that the charters of the two companies which by amalgamation had become the litigating company were of no assistance to it upon the point now under discussion; they believed that the only company which ever had permits from the city for the distribution of power (No. 2) was out of existence; and their idea was that the powers of that company had died with it. When, therefore, their Lordships' statement, above quoted, reached Winnipeg it was met by a somewhat general outburst of protest and suspicion. The Free Press printed the following (22nd March, 1912):—

"Who is Responsible?"

"Sir Robert Finlay, engaged by the city of Winnipeg as counsel before the Privy Council in London to have charge of the handling of the city's case against the Winnipeg Electric Railway Company, was authorized to abandon the ground won by the city against that corporation in the Courts in this country; to offer no opposition to the contention by counsel for the company that it possesses all the corporate powers and privileges of the now defunct companies whose

plant and property it bought out. The people of Winnipeg are still waiting to know who is responsible for hauling down the city colours and abandoning the fight, and why Sir Robert Finlay was not instructed to hold the ground already won for the city.

"Six years ago the city began its legal fight against the company. In reply to the statement of claim filed by the city at the outset, the company advanced the claim that it possessed the corporate powers and privileges of the defunct companies referred to, namely:—

"(1) The Manitoba Electric and Gas Light Company,

"(2) The North-West Electric Company,

"(3) The Winnipeg General Power Company,

which it bought out in 1898, 1900, and 1904, respectively. The claim thus advanced by the Winnipeg Electric Railway Company was fought by the city in the Court of King's Bench here, which decided in favour of the city, and in the Court of Appeal, which confirmed that decision. Both Courts decided that the company did not acquire the corporate powers and privileges of the defunct companies, for the reason that those companies had no authority to transfer their powers and privileges, but only to sell their plant and property.

"In that respect, the city beat the company in both the Courts in this country. On the fight being carried across the Atlantic on appeal, the position thus won for the city against the company was abandoned. Either Sir Robert himself suggested that course, or he was instructed to take it. There is no third supposition possible. Was the City Council, as a whole, consulted? Did the City Council agree to that abandonment of ground that had been won for the city? If so, why? If not, who instructed Sir Robert Finlay to abandon that ground; or agreed with his suggestion that it should be abandoned? The people of Winnipeg are entitled to have answers to these questions.

"This is a matter of vital importance to the people of this city. It affects the future economic and social well-being of Winnipeg. It means the saddling of the city with an enormous burden. The Privy Council decision, it has well been said, vests the Winnipeg Electric Railway Company with judicial power to make itself at home on Winnipeg's streets and to ride rough-shod over the public interests.

"And this decision rests on the fact that the counsel for the city before the Privy Council, said never a word in regard to the company's claim, as noted above.

"To quote once more from the first paragraph of the Privy Council judgment (London Times report):

"It was not denied by the counsel for the respondent (that is, the city of Winnipeg), that the powers, rights, privileges, and franchises belonging to the respective companies who were predecessors of the appellants (that is, the Winnipeg Electric Railway Company), have been taken up and carried forward by reason of the various transactions of amalgamation and otherwise, and are now vested in the appellants.'

"After setting forth the vanished companies' corporate powers and privileges, which the Courts in this country had declared defunct, but which the city representatives without a word of objection, allowed to be resurrected and galvanized into life, the Privy Council judgment says again:

"The validity of any of the amalgamations referred to has in no particular been questioned in the present case.'"

As a matter of indubitable fact, neither counsel nor solicitor was at fault, and the blame was transferred elsewhere when it became known that the solicitor had properly instructed counsel, and that counsel had fully argued the case. Having the stenographic report of the argument before me, I am able to say that the fact which their Lordships say "was not denied," was not only combatted to the extent of (at one place alone) 21 pages, (about 7,500 words), but that their Lordships took part in the discussion. In various parts of the argument, the following language appears:

"Counsel: 'My point is that they did not transfer—they could not have transferred, and they did not purport to transfer, the corporate rights of those two companies. I say those two companies, if they did not cease to exist, remained as mere ghosts. The contractual right which they had established with the city passed over to the street railway company. The corporate rights did not.

"This amalgamated company, no doubt, has the contractual rights of the two companies amalgamated to form it, but my point is that it has not any of the corporate rights of the two old companies, the Gas Company and the North-Western Company, and that is so for reasons that I shall now very shortly give your Lordships."

"THE LORD CHANCELLOR: The point is that under that word 'contract' it cannot transfer these powers.

"Counsel: Yes. The word is not wide enough for it. So much for the Gas Company's power to transfer.

"THE LORD CHANCELLOR: Now you were going to say the Street Railway Company had not the power to buy.

"Counsel: It had not the power to buy a company of this kind, and for several reasons.

"LORD ROBSON: You must not forget clause 2 of the agreement to which you have referred, by which the city and the Manitoba Gas Company are bound to confer upon the North-West Electric Company that power.

"Counsel: But I am dealing at present with the charter powers of these two companies. It is said one of them purchased the charter powers of the other, and I am examining that argument, and my position, I respectfully submit to your Lordships, is that neither had the Gas Company the power to sell its corporate powers, nor had the Street Railway Company the power to purchase, for the two reasons I am giving.

"Then the third point is that even if the North-West Company had any rights under this agreement the present company has not, because none of the rights of the North-West Company passed over to the Street Railway Company.

"Now, my Lords, if I have made it clear that the Gas Company's corporate powers did not pass to the Street Railway Company, I have a much easier task in upholding the statement that the powers of the North-West Company did not pass to the Gas Company.

"My point is that no company has authority to do a power business in Winnipeg at all, and I am trying to work that down in this way. I shew, in the first place, that I get rid of the two old companies' corporate powers, to begin with. I say those two old companies were buried twenty years ago, so far as this case is concerned, and nobody is acting as agent for them or on their powers.

"LORD ROBSON: They were not amalgamated, were they?

"Counsel: No, my Lord, they were not amalgamated.

"LORD ROBSON: They were simply buried?"

"THE LORD CHANCELLOR: Your proposition is that after a certain period the Street Railway Company did it under its own power?

"Counsel: Yes, my Lord.

"THE LORD CHANCELLOR: That is your contention?

"Counsel: Yes, that is my contention, my Lord, and that the Gas Company and the North-West Company were buried too.

"LORD ROBSON: And the right to use poles in the North-West was buried too?

"Counsel: Yes, that was buried too.

"LORD ROBSON: Therefore, they had no corporate powers and no other powers to speak of, because the other company had powers of its own.

"Counsel: Yes, that is so.

"LORD ROBSON: Then there was a good deal of trouble taken with such a company. It only was born for the purpose of a funeral.

"Counsel: But their assets were bought, and amongst them was this contract that afterwards the Street Railway Company performed.

"THE LORD CHANCELLOR: *I think we now appreciate your point.*"

Explanation of the statement in their Lordships' judgment, to the effect that counsel did not deny what was so elaborately combatted, is difficult. I can only suggest that it may possibly be attributed to the difference in the attitude which their Lordships assume towards British cases and colonial cases—the one are treated judicially, and the other, sometimes paternally, and, therefore, not so carefully. As in the case of *The King v. The Royal Bank* (discussed *ante* p. 269), in which a new and disturbing idea with reference to our constitution was promulgated, so here, when immense interests in the city of Winnipeg are involved, we are put off with a mere affirmation with which it is impossible to be satisfied.

When, a few days ago I told a brother K.C. that the Judicial Committee had apparently declared that one company could transfer its charter powers to another company, he asked:

"How did they come to do that?"

"They said that counsel had conceded the point," I answered.

"Even so," he replied, "did they not know any law themselves?"

JOHN S. EWART.

EDITORIAL.

All communications should be addressed "The Editor" Canadian LAW TIMES, 705 Confederation Life Building, Toronto.

The Editor will be pleased to receive contributions on any subject of legal interest, and will pay for all articles accepted.

In last month's issue of the *Canadian Law Times* the editorial relating to the application of the City of Toronto to the Dominion Railway Board for a uniform telephone rate throughout the whole of the city limits has called forth a protest from certain of the readers of this magazine. The Editor would be glad to publish these letters in full had permission, which was asked for, been obtained, but out of deference to our correspondents no further mention will be made to the correspondence.

Again reverting to the question of the city of Toronto's claim, concerning which it may be mentioned that an appeal from the decision of the Railway Board has been taken, the conditions existing in Toronto will sooner or later arise in every municipality from one end of Canada to the other, and there is no doubt that a decision similar to that recently given in favour of the Bell Telephone Co. against the City of Toronto will be fought by the municipality concerned to the bitter end. The chairman's decision not to sit in judgment on the question, if pushed to its logical conclusion, would result in his leaving the decision of issues similar to the present to his colleagues for some years to come.

So great was the confidence inspired by the prompt energetic action of the Dominion Railway Board, and the justice of the decisions given, that the people throughout the country had come to regard this most important Court as the protector of their rights against the greed of the great corporations, and it would be a pity if this opinion were changed.

At the Birmingham Assizes an incident recently occurred which shews the exciting and really dangerous conditions under which criminal cases are disposed of now and then in British Courts of Justice. The newspaper report was as follows:—

ASSIZE COURT SENSATION.

[Press Association Telegram].

A sensational incident took place in the Crown Court at Birmingham Assizes yesterday morning, where Mr. Justice

Ridley presided. The first prisoner tried was Thomas Field, who was charged with housebreaking and theft.

The case had not proceeded far when everyone was startled by a crash on the Judge's desk. In the absence of the dock attendant, Field had seized the stool which is provided in the dock for some of the prisoners, and hurled it with great force across the Court. It passed over the barristers' seats as well as over the clerk of arraigns, struck the desk where Mr. Justice Ridley was writing, and rebounded on to his head.

His Lordship's wig and glasses were knocked off, and it was feared he had been seriously injured. Holding his hands to his face, his Lordship rose and returned to his private room, followed by his associate and others. Meanwhile the dock officer was struggling with the prisoner, whom he hustled down the steps to the cells below.

After an absence of about fifteen minutes, His Lordship returned. He had a red mark on the forehead over the eye, but the skin did not appear to have been broken.

The prisoner was then brought back. Addressing him, His Lordship said: "Don't throw anything like that again. You might kill me next time."

Prisoner said: "I meant it for witness. I did not mean it for you."

His Lordship: "I don't know who you meant it for, but you hit me full in the face."

Addressing the dock officer, His Lordship said, "Take hold of the man's arms; don't let him have the use of them; at any rate he is a very dangerous man."

The trial was then proceeded with, the police guarding the prisoner on either hand. He was found guilty and sentenced to serve out the remainder of a previous sentence and five years' penal servitude in addition.

When Mr. Justice Ridley left the Assize Court last evening, his left eye shewed signs of discoloration and there was a deep scar inside the left eyebrow. Asked by the clerk how he had been struck, His Lordship said he thought the stool grazed the top of his desk and struck him full in the face. He was hit in the eye, across the forehead, and on the chin. The whole occurrence was so sudden that he did not notice the prisoner's movements.

PERSONAL.

A proposal was discussed at the second general meeting of the members of the Alberta Bar, which met with about 100 members in attendance in Edmonton, that the roll of barristers and solicitors be separated here as in England. In support of this motion C. L. McCaul, K.C., Edmonton, gave an able address, sketching the history of the British Bar.

James Muir, K.C., president of the Law Society of Alberta, addressed the meeting, and an address of welcome was extended to the visiting members by J. C. F. Bown, K.C., of Edmonton. J. L. Fawcette, Macleod, was elected chairman, which C. F. Adams, Calgary, acted as secretary.

The question of separating the solicitors and barristers on the roll aroused a good deal of interesting discussion.

In favour of the motion Mr. McCaul urged the advantages to be derived from a division of labour, that the barristers were most apt to have the right judicial temperament, the prejudices of the client often affecting the solicitor, the greater influence with the Courts of barristers of long experience and recognized standing and also the tendency to specialization. He pointed out that under a division of the duties of barristers and solicitors, barristers were able to specialize in such subjects as company law, property, banking, constitutional law, private and international law. He also urged that great counsel were born and not made.

Other speakers followed, both for and against. James Ross, an Irish solicitor, advised against the practice on the ground of the great increase it would entail in the cost of litigation. He also said that in Ireland the best legal business was controlled by about a dozen leading barristers, who would not undertake any case, no matter what the interests involved unless their special terms were agreed to. Further he contended that it would not be in the interests of the profession, because where it was a custom that counsel had to be engaged by the solicitor, the counsel very often did not give sufficient time to their cases in order to properly grasp them and as a consequence the clients and the solicitors who had the cases in hand suffered.

On a vote being taken the motion to separate the two branches of the profession was lost by a large majority.

W. Beattie of the law firm of McKay, Adam, Beattie & Fear, has severed his connection with that firm to remove to Medicine Hat, Alta., where he will open an office for the practice of law.

Mr. Israel I. Rubinowitz has received the appointment of police magistrate for Richmond municipality of British Columbia, from the municipal council, filling the office rendered vacant by the resignation of Mr. P. S. Falkner. The salary of the new magistrate will be \$100 a month during the summer and \$75 monthly through the remainder of the year.

T. P. St. John, barrister, formerly a member of the firm of Lynd and St. John, has opened offices in the Willoughby building, where he will carry on his practice in future. Mr. St. John is well known in Saskatoon, having lived here for a number of years. He is well known in athletic as well as legal circles and was a strong asset to the Young Liberal football club. He also has no mean reputation as a hockey player.

News of the death of John Kerr, prominent barrister and chief of the St. John fire department, came as a great shock to his friends.

He was a son of the late David Shanks Kerr, who was a widely known barrister in that city. Chief Kerr had been in charge of the fire department for thirty-one years. He had handled all the fires in the latter day history of the city, including the Indiantown fire about fourteen years ago. He knew the fine points of the scheme of fire-fighting and trained his men accordingly.

Chief Kerr was born in St. John about 66 years ago. He was admitted as an attorney in 1869, and as a barrister in 1870, and by the time of his appointment as chief of the fire department in 1882 he had won an enviable reputation as a criminal lawyer. One of his most celebrated cases was the Theall murder trial, in which he defended the prisoner, carrying the case to the Supreme Court and succeeding in having the verdict reduced to one of manslaughter. Since his appointment as chief of the fire department his law practice was confined more to office work. Chief Kerr was a prominent member of the Masonic fraternity and was also a member of the Loyal Orange Lodge.

Messrs. Russell, Russell & Hancock, of Vancouver, beg to announce that Mr. J. A. Russell has retired from the firm, and that they have taken into partnership, Mr. M. A. MacDonald, formerly of Cranbrook, B.C., Mr. J. McDonald Mowat, formerly of Kingston, Ont (a member of the Ontario Bar), and Mr. Wendell B. Farris, formerly of Nelson, B.C., who have been with the firm for the past year, and that they will continue their practice under the firm names of Russell, MacDonald & Hancox and Russell, Mowat, Hancox & Farris, at their present offices.

After practising for upwards of twenty-two years as a barrister in the city of Hull, Mr. G. C. Wright has decided, in view of his increasing business, to amalgamate with two well known Ottawa lawyers. From the first of May next Mr. Wright's office will be known by the name of Wright, Gamble and Smart. The two new members of the firm are well known in law circles in the Capital. Mr. Wm. Gamble, K.C., has been practising in Ottawa for a number of years, having offices at the Sparks Street Chambers, while Mr. R. S. Smart is a late partner in the firm of Fetherstonhaugh and Smart, patent attorneys.

J. E. Martin, K.C., was unanimously elected Batonnier of the Montreal Bar Association at the annual meeting. The name of Mr. Martin was proposed by A. W. Atwater, K.C., who was supposed to be a rival candidate.

Gonzalve Desaulniers, K.C., was elected syndic and Aime Geoffrion, K.C., treasurer, both unanimously.

Other appointments made were five members of the council and one secretary. The nominees for the council of the Bar were F. de S. Bastien, K.C.; P. Beullac, K.C.; A. W. Atwater, K.C.; J. L. Perron, K.C.; G. W. Macdougall, K.C.; N. K. Lafamme, K.C.; M. A. Phelan, C. de Mattigny, and J. O. Fournier. As there was one candidate too many, the ballot was cast.

It was the same for the secretary. The nominees are L. Delage, T. Jette, P. Raymond and J. Delorimier. Scrutineers were appointed and the ballot closed.

Previous to the election, Georges St. Pierre, the retiring secretary, read the report, which stated that 37 new lawyers were admitted to the Bar of Montreal during the year; 4 lawyers suspended for periods varying from one to five years;

that the standing of the association was heightened by the attendance of His Royal Highness the Duke of Connaught at the annual banquet, and that strong recommendations for a new Court House had been placed with the Provincial Government.

The list of attendance for 23 meetings shewed 23 visits for Mr. St. Pierre, the secretary, and 22 each for Mr. Archambault, and J. E. Martin, the retiring and new Batonniers respectively.

J. W. Neelands, barrister, of Winnipeg, has taken over the practice of G. A. Colquhoun, who is leaving to practise his profession in Regina. Mr. Neelands has been connected with two of the largest law firms of Winnipeg and has had a very wide experience, and should meet with success in his practice here.

Mr. Neelands is an Easterner, having received his education at Brampton High School and the University of Toronto. He came west in 1907, and commenced the study of law with the well known firm of Campbell, Pitblado Co., of Winnipeg, and was called to the bar in November, 1911. Since that time he has been connected with the law office of Wilton, McMurray, Delorme, Davidson & Wheeldon, one of the largest law firms of Winnipeg.

Practice at the Bar has its exciting moments, as A. Cohen of Nicholson and Cohen, St. James street, can testify. Mr. Cohen is one of the younger members of the Bar, and has been practising only a few months. One of his first cases was the defence of two of the accused now awaiting trial on the charge of abduction made by Miss Schachter.

Now, Mr. Cohen is in receipt of an anonymous letter threatening that he will be shot if he continues with the case. The letter has been ingeniously put together by means of words cut out of a newspaper and pasted on a sheet of paper. It bore no handwriting whatever, and was enclosed in an envelope on which one of Mr. Cohen's business cards had been pasted as an address.

The letter was posted in Montreal, and has been placed in the hands of a private detective agency for investigation.

A Robertson Smith, barrister, has taken as a partner G. R. Fleming, the late assistant city solicitor.

The new firm will practise under the firm name of Smith and Fleming, Saskatoon, and also at Wilkie. Mr. Smith will continue in charge of the Saskatoon office, and Mr. Fleming will manage the office at Wilkie, where he has already taken up his residence. Both members of the firm qualified as solicitors in Scotland, Mr. Smith taking his law course at Glasgow University and Mr. Fleming at Edinburgh University.

The Board of University Governors of Saskatoon were the recipients at their quarterly meeting this morning of many gifts which will aid the city's young Varsity, but out of the number two are of such munificence that they are worth singling out for special mention.

Mr. Frederick Engen has endowed the University to the extent of \$100,000 by the donation of \$5,000 a year. Mr. Engen in his gift has specified that it shall be used for original research, and Principal Murray states that it will be used for the scientific side of political economy.

Another gift which is highly munificent is that of Mr. Allan Bowerman, who will establish a large bronze statue of the late Edward the Seventh in his role of Edward the Peacemaker.

The statue will be placed in a prominent position at the entrance to the University. Mr. Bowerman has been going over a number of plans submitted by leading American and European sculptors, and it is stated has arrived at a decision in the matter.

Principal Murray declined to state just how much the statue would cost, but rumor saith that it will be in the neighbourhood of \$10,000, which will mean that Saskatoon will have one of the finest specimens of the sculptor's art in Western Canada.

While these bequests show the generosity of the citizens of Saskatoon, perhaps the most important item that was dealt with by the governors at their morning session was the question of the establishment of a law school in connection with the University of Saskatoon. This decision was arrived at after much discussion, and Principal Murray is authority for the statement that it is hoped to have this department organized and ready to start work by the fall of the year.

At a meeting in the near future, if not at the present meeting, a faculty of law will be appointed. Several additions will also be made to the pedagogic staff of the Department of Agriculture.

At this morning's meeting the appointment of Mr. G. H. Cutler, Mr. A. N. Smith, and Mr. R. K. Baker were made to the Faculty of Arts. These gentlemen will start their work in the very near future.

"Both Mr. Bowerman's and Mr. Engen's gifts are just what we want at the University," said Mr. Murray. "We could not possibly have a better thing than the latter, and the gift could hardly have taken a happier form than that in which Mr. Engen has given it to us.

"The Government has made provision for original research in agriculture and this will be devoted to the scientific side of political economy. Its effect should be great and far-reaching on the constructive life of the University."

In addition to these two bequests there has been a number of gifts of books and various sums of money, all of which have been received with appreciation by the University.

Frank J. Keith, partner in the law firm of McColl and Keith, Cobourg, has just died suddenly at his home from agina pectoris. He arrived home from his office about 6 o'clock, apparently in his usual health, but shortly after supper he was suddenly stricken, passing away about 11.30 p.m.

The late Mr. Keith was a rising young lawyer of the town and was very well known here. His partner, Mr. McColl, was Liberal member for Cobourg in the Laurier Government.

LAW SOCIETY OF MANITOBA HOLDS TRIENNIAL ELECTION.

The triennial election of Benchers of the Law Society of Manitoba took place at the Court House recently when the ballots were opened and counted by the scrutineers. Those selected to act as scrutineers were C. F. Wilson, K.C., the treasurer, F. P. Garland, and A. B. McAllister.

The Benchers elected for the Eastern Judicial District were: L. Campbell, K.C., A. B. Hudson, C. P. Mil-

son, K.C., I. Pitblado, K.C., E. Anderson, K.C., A. J. Andrews, K.C., J. H. Munson, K.C., J. A. M. Aikins, K.C., J. S. Tupper, K.C., W. R. Mulock, K.C.

The Benchers elected for the Central Judicial District was A. Meighen; for the Western Judicial District, Hon. G. R. Coldwell, K.C.; for the Southern Judicial District, A. W. Bowen; for the Northern Judicial District, H. F. Maulson.

The results are now announced of the March examinations conducted by the Incorporated Law Society of British Columbia, and as will be seen, the legal profession of the Province is increased by a number of gentlemen from both the east of the Dominion and also from the English, Scotch and Irish Bars.

Preliminary: Messrs. Roy T. Stewart, F. E. Clough, J. G. Mackinlay, John Greig, C. I. Cameron, D. B. Walker, and J. L. Pyke. First Intermediate: Messrs. F. S. Cunliffe, A. J. Fisher, R. L. Stultz, G. S. Selman, R. W. Lane, L. W. Cottingham, G. J. Boyd, W. S. Lane. Second Intermediate: Messrs. Adair Carss, A. R. McLeod, R. C. Crowe, C. J. Cameron, A. D. King. Students for call: Messrs. M. A. van Roggen, J. F. Mather, R. L. Maitland, J. D. McPhee, C. H. Kearns, H. N. Lidster. Articled clerks for admission: Messrs. J. F. Mather, M. A. van Roggen, R. L. Maitland, J. D. McPhee, H. N. Lidster, A. Donaghy, C. H. Kearns. British Columbia barrister for admission: Mr. O. Lawrence Bancroft. British Columbia solicitors for call: Messrs. A. H. Boulton, J. A. Davidson, Donald Smith, Hugh Campbell. Eastern Canadian barristers and solicitors for call and admission: Messrs. F. W. Wilson, T. E. Parke. English barristers for call: Messrs. S. T. Hankey, G. B. Duncan. English solicitors for admission: Messrs. A. Hallgate-Hills, T. J. Baillie, G. B. D. Scale, E. Herne. Irish barrister for call: Mr. D. J. O'Neill. Irish solicitor for admission: Mr. W. J. Bradley. Scotch solicitor for admission: Mr. W. G. C. Stevenson.

Messrs. R. M. Grant, M. J. Coady, Miss Cecelia R. Green, Messrs. R. R. Holland, J. G. White, and Eric P. Dawson, graduates; and Messrs. A. R. Creighton, H. W. Green, Roy T. Ledingham, E. S. Davidson, and R. P. Maltby, matriculants, were entered as students under Rule 41.

LAW SOCIETY ELECTS BENCHERS.

The Law Society of British Columbia has elected as its Benchers for the current year Messrs. R. T. Elliott, K.C., L. G. McPhillips, K.C., J. H. Senkler, K.C., A. P. Luxton, K.C., G. E. Corbould, K.C., E. P. Davis, K.C., W. C. Moresby, E. V. Bodwell, K.C., and Sir C. Hibbert Tupper.

IS THE DOCTRINE OF CONSIDERATION SENSELESS AND ILLOGICAL?

In a recent article Dean Ashley, a distinguished authority on contracts, takes the somewhat paradoxical position of being at the same time counsel for the defence and also prosecutor of the doctrine of consideration. While defending it against various relaxations and modifications which have been suggested to accomplish more rational and just results, which he denounces as subterfuge and unwarranted usurpation of legislative power by the Courts, he also, as it were, saws off the branch he is sitting on, by contending that the time has now come, either for the Courts themselves to overrule the entire doctrine, or for the Legislature to act and by a brief statute declare that the doctrine of consideration is hereby abolished.¹

Is the doctrine of consideration "a technicality existing simply because of the historical development" of contract; a legal rule "which is unnecessary, and which frequently works rank injustice;" is it one of the "outgrown doctrines" which lead the people to regard law and lawyers with suspicion and which neither Courts nor writers understand or are willing to apply consistently?

If this accusation is true, it is indeed a severe indictment, and it is worth while to inquire whether there is not any intelligible reason, purpose or policy underlying the requirement of consideration by our Courts, by which it has been enabled to survive for over three centuries as a basic doctrine of the most important branch of our law; and whether if there are serious defects in the test of consider-

¹ Clarence D. Ashley, *Doctrine of Consideration*, 26 Harv. L. Rev. 429, March, 1913.

ation, they can not better be corrected by relaxations and modifications, than by an entire abolition of this fundamental requirement.

If we look for a moment at the history of the law we shall find that the consideration came to be recognized as one of the elements of simple contract by a more or less accidental and obscure historical evolution.¹ It was evolved in the judicial process of furnishing a remedy to those cases which could be brought within the theory of the action of special *assumpsit*. This form of action was a branch of trespass on the case, which called for a remedy where there was a wrong or injury inflicted, on the principle *ubi jus, ibi remedium*. *Assumpsit* was not originally founded on the idea of enforcing a promise like covenant, but of redressing a wrong. No wrong is ordinarily done by the breach of a merely gratuitous promise, or *nudum pactum*.

The consideration then is the ground of enforcement; that which renders a promise not merely gratuitous, but one resting on a just and obligatory basis with a sufficient reason for enforcement. The doctrine of consideration is a not very successful attempt to generalize and reduce to a rule of thumb that reciprocity which must exist in an agreement to make non-performance a legal wrong on the part of the promisor. It is not a mere arbitrary, unreasoning technicality, a mere requirement of obsolete procedure.

The common law, in requiring a consideration, treats all simple contracts as resting primarily on the basis of bargain, as contrasted with those promises which are simply gratuitous and in which there is no mutuality of concession or benefit flowing to each party. The typical contract in the common law may be defined as an obligation arising from a bargain. All business dealings consist, in the last analysis, of bargains or arrangements for present and future exchange. Without some positive sanction for the expectation that bargains will be honestly fulfilled, men would be unable to do business or make reliable arrangements for the future.²

Dean Ashley asserts that this is not the reason of the rule, and seems to believe that consideration exists for its

¹ See e. g. Debt, *Assumpsit* and Consideration, W. S. Holdsworth, XI Mich Law Rev. 347.

² Wald's Pollock on Contracts, 3rd ed. 1, 2.

own sake. But nothing operates as a consideration which is not regarded or treated as an item of exchange by the parties. It must be offered by one party and accepted by the other as the "conventional inducement" or reciprocal concession for what is promised.³ The phrases, "at defendant's request," "in exchange for the promise," "in consideration of," unmistakably point to the fact that the rules of consideration find their object, their reason for existence in the law, primarily as a test whether the engagement of the parties is put on the basis of bargain, or whether it is gratuitous, and so lacking any ground of enforcement. Incidentally, the "legal detriment" part of the definition of consideration is a secondary test as to whether the thing given or to be given in exchange has any possibility of value in the eye of the law sufficient to afford any real reciprocity. The reciprocal nature or business basis of the transaction is that of which the apparently arbitrary and technical rules of consideration furnish the touchstone or test, and is that which makes the application of the doctrine of consideration not so irrational and lacking in any intelligible purpose as Dean Ashley would have us think.

It may be admitted that the strict and orthodox doctrine, which takes bargain (as the universal and only sufficient legal reason for enforcing a promise, is not an entirely valid generalization of all the grounds that should be recognized for the enforcement of simple promises. Bargain is not the only reason which makes the enforcements of promises justly imperative, but as Professor Samuel Williston has suggested to the writer, "why should not a promise be enforced; if the promisor might reasonably suppose the promisee would act in reliance on the promise, and if the promisee has in fact done so?"⁴ In other words, he favors the extension of the doctrine of consideration by a theory of *quasi-estoppel* adopted in some states, and especially in the subscription paper cases.⁵ In these cases a promise originally gratuitous, which has been relied and acted upon

³ *Fire Insurance Association v. Wickham*, 141 U. S. 564, 579; see also Holmes Com. Law, 292; Williston on Sales, 958; Wald's Pollock on Contracts (3rd ed.) 323, n. 8.

⁴ In Private correspondence.

⁵ *Beatty v. Western College*, 177 Ill. 280; *Simpson College v. Tuttle*, 71 Iowa 596; *Derecmon v. Shaw*, 69 Md. 199; *Steele v. Steele*, 75 Md. 577; *Ricketts v. Scothorn*, 57 Neb. 51.

by the plaintiff, is upheld, as a wrong would be done if the promise were not enforced.⁶

Professor Williston objects to the doctrine of "moral consideration," advanced by Lord Mansfield, the other great relaxation of the bargain test, chiefly because of the great vagueness of moral consideration. But if the doctrine of moral obligation, as a basis or ground for the enforcement of a promise, be extended only to cases of moral obligation arising from unjust enrichment by the receipt of material or financial benefit, as where one promises to repay another who has paid his indebtedness without authority, or for improvements placed on his property by mistake, such "moral obligation" would seem to be sufficiently tangible and definite to be a just and desirable relaxation of the strict requirement of consideration, and it is certainly coming to be recognized by a very respectable number of American authorities.⁷

The truth is, the doctrine of consideration is not irrational, but the old definitions and tests are not wide enough to cover all cases of just obligation arising from a promise, and have to be strained to cover such cases as a change of position in reliance on a promise to make a gift; and fail to reach moral obligations of justice and common honesty founded on value received, almost sufficient to raise a *quasi-contract*, which, when recognized by a promise, ought to become binding in law. It is submitted that there should be recognized at the present day, three distinct forms of consideration, or grounds why it is unjust to break a promise and why a promise should be binding: (1) the usual one, the reciprocity of bargain or exchange; (2) cases of *quasi-estoppel* or justifiable reliance on a gratuitous promise; and (3) an existing obligation, legal, equitable, and also moral if based on value received, and coextensive with the promise.

The conception of consideration as a test of the intrinsic nature of the transaction, as based on an exchange present or future, rationalizes and illuminates the whole doctrine and furnishes the key to the maze of conflicting views as to the element of consideration in bilateral contracts, and gives it a logical, rational and scientific basis.

⁶ See also Wald's *Pollock on Contracts* (3rd ed.) 215, n. 24; *Harriman on Contracts* (2nd ed.) § 129, 150, 649.

⁷ See exhaustive note to *Muir v. Kane* (1910), 28 L. R. A. (N. S.) 552; see also the writer in 7 *Borchardt's Commercial Laws of the World*, 84, 87.

"What logical justification is there," asked Sir Frederick Pollock, "for holding mutual promises good consideration for each other? None, it is submitted."⁸

That is true if we assume the premise that the consideration in a bilateral contract must be found in a present detriment imposed by promise at the instant the contract is made; for neither promise before it is known to be binding is in itself any detriment to the promisor.

From the year 1588 Courts have designated the promise as consideration for the counter-promise in bilateral contracts.⁹ Lawyers and learned writers have religiously repeated the formula: "It is the counter-promise and not the performance that makes the consideration."¹⁰ But no one has satisfactorily analyzed this ancient formula to shew how it is that reciprocal promises can support each other, like two men mutually holding each other above the ground. Attempts at analysis have most frequently been made in connection with the question whether a promise to do a thing will or may be a consideration, where the actual doing of it would not be; *e.g.*, where one promises to do a thing which he has already contracted with a third person to do. The solution of this question tests to the uttermost one's theory of consideration, and "if it cannot be applied here it is not good for much anyhow."

Langdell, Pollock, and Beale contend that the second promise, being the incurring of a new detriment or burden, is sufficient consideration, though each promise be to do the same thing and though the doing of the thing would not be consideration.¹¹

Professor Williston thinks that from a rational standpoint it is an odd distinction to hold that an assurance of future performance is a better consideration than actual

⁸ 28 Law Quar. Rev. 101, Jan. 1912; Pollock on Contracts (8th Eng. Ed.) 191; compare note by Williston to 3rd Am. Ed. 201, N. 4.

⁹ *Strangeborough v. Warner* (1588), 4 Leon. 3; *Wichals v. Johns* (1599), Cro. Eliz. 703; *Bettisworth v. Campion* (1609), Yelv. 134.

¹⁰ *Hobart in Lampleigh v. Braithwaite* (1616), 1 Sm. L. C. 155; Langdell, Summary § 81; Wald's Pollock on Contracts, 3rd ed. 186; Harriman on Contracts, 2nd ed., § 194; *Vickrey v. Maier* (Cal. 1913), 129 Pac. 274.

¹¹ Langdell, Summary, § 84; 14 Harv. L. Rev. 496; Wald's Pollock on Contracts, 3rd ed. 209, n. 19; Beale, 17 Harv. L. Rev. 71, 81, 82.

present performance, or that a bird in the hand is worth less than a bird in the bush.¹²

To solve this puzzle whether a promise to do something one is already under contract to do may be consideration, one must ascertain just what is the element or nature of consideration in the case of bilateral contracts. It is contended by Professor Ames that the consideration is found in the act of promising, that the mere making of a promise, on request, *animo contrahendi*, is sufficient consideration; and that any promise whatever, not in violation of public policy, is sufficient consideration to support a counter-promise.¹³ So Pollock lays it down that it is the promise, and not the obligation thereby created, that is the consideration, although he admits that the value of the promise does not consist in the act of promising but in the obligation.¹⁴ But it seems fanciful to suggest that mere words, movements of the lips, vibrations of the vocal chords, the act of signing one's name, are the consideration requested.¹⁵

Professor Langdell explains the element of consideration on the ground that the Courts early perceived that "the making a binding promise was the giving or doing something of value, and hence such promises were entitled to be admitted into the category of sufficient considerations."¹⁶ He proceeds to say: "So the rule that both the mutual promises must be binding, or neither will be, is only an application of the rule that a consideration must have some value in the eye of the law; for if one of the promises for any reason is invalid, of course the other has no consideration, and so they both fall."¹⁷

Prof. Ashley, who is a disciple of Langdell, contends that "promise" in the consideration formula must be understood to indicate an obligation.¹⁸ It would also seem to be the view of the Courts that in bilateral contracts it is the counter legal obligation which furnishes the considera-

¹² Note to Wald's Pollock on Contracts (3rd ed.) 210; see also Harriman on Contracts, 2nd ed., § 123; Ashley on Contracts, 103; Ames, 13 Harv. L. Rev. 30; 2 Street, Foundations of Legal Liability, 118, 119.

¹³ Ames, 13 Harv. L. Rev. 20, 32.

¹⁴ Wald's Pollock on Contracts, 202.

¹⁵ See Beale, 17 Harv. L. Rev. 77.

¹⁶ Langdell, Summary, § 81.

¹⁷ Langdell, Summary, § 82.

¹⁸ 16 Harv. L. Rev. 319; Ashley on Contracts 90, 92.

tion. Thus Holt, C.J., says: "Either all is *nudum pactum* or else the one promise is as good as the other."¹⁹

There are at least three serious objections against the soundness of this generally accepted theory that obligation is consideration for obligation: (1) In many cases where there is no real obligation and no "legal detriment" resulting from the promise on the one side, there is still held to be no lack of consideration to support the counter-promise on the other; (2) In certain cases, where the promise, if binding, would impose a "legal detriment" there is held by the authorities to be no consideration; (3) As an attempted application of the detriment test of consideration, it involves the fallacy of question-begging or arguing in a circle, for legal obligation cannot be the source of consideration, and consideration at the same time the source of legal obligation.

If it is the binding promise or legal obligation of each party which forms the consideration for the promise of the other, how are you to explain the variety of cases in which one party is liable on the contract but not the other?

As a general rule, it is true that bilateral contracts do not bind either party unless both are bound, as in the case of a contract with a married woman. This is so, however, not necessarily for the reason that the promise of the married woman, being void in law, cannot serve as a consideration, or that there is no consideration present in the bargain, as has been somewhat hastily assumed. Invalidity of a contract for lack of mutuality of obligation does travel on the principle of lack of consideration, where by the terms of the bargain the plaintiff does not assume any definite undertaking, or where the promisee by his mere acceptance

¹⁹ *Harrison v. Cage* (1698), 5 Mod. 411.

Thus Sanborn, J., says in a leading case. "A promise is a good consideration for a promise. But no promise constitutes a consideration which is not obligatory upon the party promising. It must bind the promisor so that the promise may maintain an action for its breach, or it is without legal effect and void." *Coldblast Transportation Co. v. Kan. City Bolt & Nut Co.*, 114 Fed. 77, 52 C. C. A. 25, 57 L. R. A. 696.

So the Supreme Court of Georgia lays it down: "A promise, however, is not good consideration for a promise unless there is an absolute mutuality of engagement, * * * and in case of mutual promises, where the promise of one party is relied on as consideration for the other, the promises must be concurrent and obligatory upon each at the same time in order to render either binding." *Morrow v. Southern Express Co.*, 101 Ga. 910, 28 S. E. 998; see also *Vogel v. Pekoc*, 157 Ill. 339.

has really promised nothing in return.²⁰ But where one promise is unenforceable, and the lack of mutuality of obligation is due to some fact outside the content of the bargain, such as incapacity of one of the parties, the Statute of Frauds, fraud, duress, or the like, there seems to be no trouble about lack of consideration, though there is no mutuality of obligation.²¹

In any system of law, whether the peculiar doctrine of consideration is recognized or not, if the law refuses to impose an obligation on one party to a two-sided bargain, as in the case of a married woman at common law, this might in and of itself furnish a reason why neither party should be bound, and why the bargain should fail altogether. Invalidity for lack of mutuality of obligation is not in all cases, therefore, to be attributed to lack of consideration.²²

In *Justice v. Lang*,²³ the distinction between lack of consideration and want of mutuality of obligation is brought out, and it is held that although the plaintiff may not be liable to an action on the contract because of the Statute of Frauds, that does not destroy the consideration or let off the party who has signed a memorandum of the contract. In other words, there need not be mutuality of obligation in all cases to make a contract binding. Professor Ames enumerates various instances of this, such as contracts procured by fraud, for example, an engagement to marry between a man already married and a woman who believed him to be single.²⁴ Similarly, an infant plaintiff may sue on a contract, though his infancy would be a defence to an action against him.²⁵ So by the weight of American authority, "a contract made by one who is drunk or of unsound mind, so as to be incapable of understanding the nature of his act, is generally held not void, but voidable at his option."²⁶ There would seem to be no such mutuality of obligation in all these cases as is said to be

²⁰ See *Burgess Fibre Co. v. Broomfield*, 180 Mass. 283, 62 N. E. 367.

²¹ Cf. I Page on Contracts 451, 460.

²² But compare Harriman on Contracts, 2nd ed., § 103.

²³ 42 N. Y. 493, 521; contra *Wilkinson v. Heavenrich*, 58 Mich. 577; 1 Am. Rep. 57.

²⁴ Ames. 13 Harv. L. Rev. 33, 34.

²⁵ *Holt v. Ward*, 2 Str. 937; *Willard v. Stone*, 7 Cowen (N. Y.) 22, 17 Am. Dec. 497.

²⁶ Wald's Pollock on Contracts, 3rd ed., 100 n. 52.

so necessary to the existence of consideration. It may be argued that the obligation imposed need not be perfect, and that a contract voidable under the Statute of Frauds, or for infancy, insanity or fraud, is not entirely without value, and may be ratified without new consideration.²⁷ But as has been said, "What sort of obligation is that which binds the obligor at his option only?"²⁸

It is generally held that if one party has the privilege at his election of withdrawing from the alleged contract, or of doing nothing at all thereunder, such a contract is void for want of mutuality.²⁹ It is accordingly very hard to reconcile the preceding cases with the accepted test of consideration, though there is no real mutuality or obligation, consideration for obligation. There may be sufficient consideration, though there is no real mutuality of obligation, and no binding promise on one side to support the counter-promise on the other.

We come now to the second objection to this theory. If a "binding promise" is a consideration because it is a detriment, then promising to do something which one is already under obligation to perform would be sufficient consideration for a new promise, because it would be a legal detriment if binding; clearly so if made to a third party as creating a new liability to him; and even if made directly to the obligee, by starting the Statute of Limitations to run afresh, it would be a legal detriment to one party and a benefit to the other. Accordingly, an application of this "obligation theory" in the test cases does not square with the authorities.³⁰

The third argument against this theory is that legal obligation cannot be the source of consideration and at the same time consideration be the source of legal obligation. This is a case of lifting yourself by the boot-straps. It is a complete circle to say that promises are binding because they are consideration for each other, and that they are consideration for each other because they are binding and so a legal detriment. This was pointed out some time ago by Professor Williston:³¹ "Unless a promise imposes an

²⁷ Langdell, Summary, § 82.

²⁸ Ashley on Contracts, 124.

²⁹ *Vogel v. Pekoc*, 157 Ill. 339; *Velie, etc. Co. v. Kopmeier, etc.*, Co., 104 Fed. 324.

³⁰ Wald's Pollock on Contracts, 3rd ed., 208, n. 15.

³¹ 8 Harv. L. Rev. 27, 35.

obligation no promise whatever can be considered a detriment. It is therefore assuming the point in issue to say a promise is a detriment because it is binding."

Professor Langdell grappled with Williston's argument as to reasoning in a circle, but I do not find that he succeeds in meeting the point.²² Langdell simply asserts it as a positive rule of law that if the promise can be binding, it is made so by the counter-promise, and it is for the objector to shew why it is not. He does not himself shew any reason why reciprocal promises logically are a detriment under his definition of consideration.

Professor Ashley states in his recent article,²³ "I must confess that the suggested difficulties have never impressed me. . . . There seems to be no logical difficulty in saying that the law operates simultaneously on each and thereby transforms each action into a promise, each mutually dependent on the other. In all cases there must be some instant at which the law takes effect." Yes, but as Professor Ashley says, in the same paragraph, refuting his own contention, "the law refuses to annex the obligation of a contract to acts of the parties which lack this essential element" of consideration. The element of consideration must be found before the law can act on the promises. One promise cannot fertilize another with consideration until it is itself fertilized. To make them act simultaneously is simply to attempt, by a sort of parthenogenesis, to make each promise indirectly fertilize itself. Like the "loop the loop," you go around the circle so fast that you don't fall out or notice what has happened.

According to the premise assumed by Professor Ashley, Professor Langdell, and the other learned theorists, the law cannot operate on either promise to annex an obligation until the element of consideration is actually furnished, and yet by their theory the element of consideration is not furnished until the law has operated. Why should the law operate on both promises simultaneously any more than on either one alone until the consideration is furnished? The elements on which Professor Ashley insists are not yet present to set the law in motion, and still he would get around this by making the promises become binding all in

²² 14 Harv. L. Rev. 496, 502, 505; 2 Street's Foundations of Legal Liability, 108.

²³ 26 Harv. L. Rev. 433.

a flash and generate their own consideration in the instant of becoming binding.

The whole trouble with the theory of consideration in bilateral contracts results from the major premise unnecessarily assumed by these learned theorists from a supposed analogy to unilateral contracts, that we must find in bilateral contracts a present detriment incurred on each side at the moment the contract is made.⁴⁴ But this premise is entirely false.

In bilateral contracts, we do not have to figure out a detriment already incurred or a benefit received at the time of making the contract. To insist on this is in effect to deny the possibility of "executory" consideration altogether. It is an artificial and medieval conception to think of each party's present grant of a right as forming the *quid pro quo* for the reciprocal grant of the other. In bilateral contracts the consideration is future. If there will be a real exchange or reciprocity of performance, the test of consideration is satisfied, when we say that mutual promises are consideration for each other we must be understood to speak elliptically, and by a figure of speech to use the word "promise" for "promised performance."

Professor Ashley finds himself unable to conceive how the contract can arise until the consideration is actually furnished. To him this means a contract without any consideration.⁴⁵ He does not seem to perceive that the rule of consideration is a mere test of the nature of the agreement, and the element of consideration may exist from the start in the nature of the agreement as a bargain before the exchange is actually carried out. He somewhat misinterprets the views of the present writer by confusing the test of consideration with that which is tested. The performance is not "the consideration" although we may often speak for convenience of the test of consideration as being the consideration. Performance on one side of a contract is intended to be in exchange for, or in consideration of, performance on the other; and the nature and relation of the performance called for are the test of the bargain.

⁴⁴ Langdell, 14 Harv. L. Rev. 506; Ashley, 26 Harv. L. Rev. 429; compare 2 Street's Foundations of Legal Liability, 57, 119.

⁴⁵ 26 Harv. L. Rev. passim.

If the parties to a bilateral contract contemplate that performance on one side is the exchange or price for the performance on the other, and, if the discharge of one party's contractual duty by the other party's breach, actual or prospective, depends on the principle of failure of consideration, it would seem that the exchange of performances is the real bargain, and not the exchange of promises. To put the subject of consideration on this reasonable footing, therefore, goes far to clear up the doctrine of implied conditions in bilateral contracts as being based on failure of consideration.³⁶

Professor Williston approaches very closely to this view of the nature of consideration in bilateral contracts, "seeking the detriment necessary to support a counter-promise in the thing promised and not in the promise itself."³⁷ As he points out, however the Judges may define consideration, it is the sufficiency of the thing to be done which they consider,—the performance, not the fact that there is or is not an obligation to perform. Dean Ashley, too, would determine whether a promise is an obligation by the nature of the contemplated performance.³⁸ The conception of consideration herein advocated is largely drawn from Professor Williston, under whom the writer first studied the law of contracts. At the same time Professor Williston does not entirely discard the ancient formula that promise is consideration for promise, although this is the conclusion to which his reasoning would seem to lead. If a promise is consideration only when that which is promised would be so regarded, does this not prove that it is not the promise which is the consideration? And although Professor Williston escapes from the absurdity of rating a promise higher than performance, does he entirely escape from the old question-begging fallacy which he himself exposed, when he speaks of the reciprocal promises covered by his test as furnishing the element of consideration for each other?³⁹

It remains to say a word as to the secondary aspect of the consideration test as applied to the sufficiency of com-

³⁶ See Wald's Pollock on Contracts, 323, n. 8;—Harv. L. Rev. 398.

³⁷ 8 Harv. L. Rev. 35, 36.

³⁸ 26 Harv. L. Rev. 433, n. 11; Ashley on Contracts, 92, 93.

³⁹ Williston, Sales, 958; see also Wald's Pollock on Contracts (3rd ed.) 201, n. 14; 203, n. 15; 323, n. 8; Ames, 13 Harv. L. Rev. 31.

pleting or promising to complete a contract as consideration for a promise of additional compensation by the other party or by a third party. There is an exchange in fact here, there is a bargain; and the question turns on the second branch of the consideration formula, whether what is offered in exchange is a "legal detriment" having any possibility of value in the eye of the law, sufficient to be the foundation of a bargain. Looking at the question broadly, the real issue in such cases would seem to be not the theoretical or metaphysical possibility of finding a microscopic "legal detriment" in some imaginary rescission or in a waiver of a supposed right to break the contract and pay damages,⁴⁰ but whether good faith and business policy permit a contractor to exact additional compensation for completion under the circumstances.

In some cases of untoward difficulties supervening, either unknown or unforeseen when the contract was made, (which, if our law were more liberal and just, would excuse performance), the contractor may be equitably or morally justified in a demand for more pay for the additional burden not contemplated by the parties, and a contract to that effect should be enforced.⁴¹

On the other hand the Court should refuse its aid to a contractor who takes unjustifiable advantage of the necessities of the other party to coerce a promise to pay increased compensation, where there is no honest or equitable reason for abandoning performance of the contract.⁴² Such an abstention from breach of contract is no more a sufficient basis for an honest claim than abstention from a crime, tort or breach of official duty. This distinction, suggested by the Minnesota case, convinces the sense of justice of many Courts in the face of technical difficulties.⁴³

Although one is already under contract with another to do a certain thing, if this contract was made in contemplation of the contracting party getting further compensation from others, it would not be a violation of his duty to earn more pay by making contracts with third parties for the

⁴⁰ Compare *Shriner v. Craft* (Ala.) 28 L. R. A. (N. S.) 450, with *Evans v. Ore. & Wash. Rd. Co.* (Wash.), 28 L. R. A. (N. S.) 455.

⁴¹ *King v. Duluth, etc. Ry. Co.*, 61 Minn. 482; *Linz v. Schuck*, 106 Md. 230, 11 L. R. A. (N. S.) 789, note.

⁴² *Alaska Packers' Association v. Domenico*, 117 Fed. 99.

⁴³ See Note 11, L. R. A. (N. S.) 789.

same performance.⁴⁴ So if a contract with a third party for the same performance were made in ignorance of the prior contract and is not extorted by a threat of breach of contract, and the consideration is doing the thing rather than a promise to refrain from violating one's obligation, it would seem to serve no purpose of justice or utility to strike down such a contract for the reason that it does not satisfy the technical test of legal detriment.

The conflict of authority on this secondary aspect of consideration shews that "legal detriment," as a universal rule of thumb which may be applied blindly and mechanically to test the sufficiency or value of consideration, has broken down; and we are driven back to the test of public policy, which was suggested by Dean Ames,⁴⁵ to exclude contracts founded on wrong or bad faith practised by one contracting party on the other. When the law of consideration is broadened so as to recognize not only bargain, but also all other just grounds for the enforcement of a promise, and gives up the foolish attempt to measure the sufficiency of what is promised in exchange by a mechanical formula, then there will be no occasion for its abolition by the Courts or by the Legislature.

HENRY WINTHROP BALLANTINE.

University of Montana.

⁴⁴ See Beale, 17 Harv. L. Rev. 71.

⁴⁵ 12 Harv. L. Rev. 529, n.; 13 Harv. L. Rev. 36, 42.

IMPORTANT POINTS OF LAW.

INDEMNITY OF A JOINT TORT-FEASOR.—More than a century ago it was decided in *Nixon v. Merryweather* that an implied indemnity does not arise as between joint tortfeasors simply by reason of the payment by one of the whole liability; and though the rule has more than once been adversely criticized, it is now too late, said Lord Herschell, to question the decision in this country. Yet if a person can lawfully employ another to fulfil a duty which the law casts on him, there seems to be no ground of public policy which prevents him from stipulating for an indemnity by the latter against claims arising from the non-fulfilment of the duty. Neither *Merryweather v. Nixon* nor any of the later authorities declares such an agreement to be unlawful, and there are dicta which support its validity. *Newcombe v. Yewen and the Croydon Rural District Council* (which came before Mr. Justice Darling last week) was an action under Lord Campbell's Act against the Board and a contractor, whom they had employed to do some work involving the excavation of a deep pit adjoining a highway, under an indemnity from him against liability to third parties for his negligence. A verdict having been obtained by the widow and daughter of a person who had met his death by falling into the pit, which they said was insufficiently fenced and not properly lit, the learned Judge held that the Board were entitled to be indemnified by the contractor. His decision will help to cure an erroneous belief in the universality of the rule that a joint tort-feasor has no right to contribution or indemnity.

DIRECTORS' CONTRACTS WITH COMPANIES.—There is a wholesome rule that in general a director of a company shall vacate his office if he is concerned in the profits of any contract with the company. The general principle is that a company is entitled to the aggregate wisdom and experience of its directors, and if all or any of the directors are interested in a contract, the company loses the benefit of their unbiased judgment. This principle is recognised in Table A., clause 77, under the Companies (Consolidation) Act, 1908, which provides that the office of director shall be vacated if the director is concerned or participates in the profits of any

contract with the company. There is an exception where the director is a member of another company which enters into contracts with the company of which he is a director, but he must not vote in respect of any such contract or work. The rule was exemplified and applied in the *Star Steam Laundry Co., Ltd. v. Dukas*, decided recently by Lord Justice Farwell sitting as an additional Judge of the Chancery Division. In that case there was a clause in the articles, of course superseding Table A, which provided for the vacating of the office of any director who should be concerned in or participate in the profits of any contract with the company. I was unsuccessfully contended that, as no profits had arisen from the contract, the office was not vacated, since the clause should be read as meaning "concerned in or participating in profits" and not as "concerned in any contract or participate in any profits." The learned Lord Justice was, however, driven to the conclusion that if the director was concerned in any contract he was bound to vacate, and that it was beside the mark to say that profits had not resulted. The general rule is clear, but it is to be remembered that it is possible in these cases, as it were, to contract out. One often sees in elaborately drawn articles provisions giving to a director full power in respect of contracts in which he may possibly have an interest, and, however undesirable this may be in principle, there is nothing against it in the statute, as there is, for instance, in the Municipal Corporations Act, 1882, which creates for the members of a corporation an absolute disqualification.

ANNUITY A CHARGE UPON CORPUS.—The question whether an annuity is a charge upon corpus has again arisen in the recent case of *Re Young; Brown v. Hodgson* (107 L. T. Rep. 380; (1912), 2 Ch. 479). The only distinction between that case and *Re Howarth; Howarth v. Makinson* (100 L. T. Rep. 865; (1909), 2 Ch. 19), noticed in this journal of the 21st Jan. 1911, p. 286, is that in *Re Young* there was a trust for the accumulation during the infancy of a child of the residue of the income after paying the annuities. In both cases there was a direction to pay the annuities out of income with an ultimate gift "subject to the said annuities," and the learned Judge decided (following *Re Howarth*) that, notwithstanding the direction to accumulate the residue

of the income, the annuities were a charge upon the corpus. The case is useful as shewing that *Taylor v. Taylor* (L. Rep. 17 Eq. 324) must be taken to have been overruled by *Re Howarth*. In *Taylor v. Taylor* the testator gave the residue of his real and personal estate to trustees for a term of eleven years from his decease, upon trust to pay out of the rents, interest, dividends, and proceeds certain life annuities, and he directed that the residue of the rents, &c., should during the term be accumulated for the benefit of the person who should become entitled to the residue of the personalty at the expiration of the term, and after the determination of the term he devised his real estate, "subject nevertheless to and charged with the payment of" the annuities, for the residue of the lives of the annuitants, with powers of entry and distress for recovery of the same, in strict settlement. Vice-Chancellor Hall held that the annuities were not charged upon the corpus, but were a continuing charge on the income; he refused, however, to order a sale, apparently because the land was devised in strict settlement. That case was commented on adversely in *Hambro v. Hambro* (1894), 2 Ch. 564, in which Mr. Justice North held that there is jurisdiction to order a sale or mortgage of land to raise arrears of a jointure rent charge issuing out of the rents and profits of the said land, though there is no express charge on the land. In the course of the argument in *Re Young*, Mr. Justice Parker asked: "What is the difference between a continuing charge on income and a charge on capital?" and counsel for the annuitant replied: "The difference is only academic." And in the course of his judgment Mr. Justice Parker said that it might in some cases be necessary to distinguish between a perpetual charge on income and a charge on capital, but he should have thought that after the case of *Hambro v. Hambro*, for the purposes of raising arrears of an annuity which was a continuing charge on income, the matter was in the same position as if there were a charge on corpus.

AER CLAUSUS.—Three centuries ago English jurists were the champions of the freedom of the seas against foreign advocates of the rights of States to assume sovereign dominion over them. To-day the roles are reversed, and while foreign jurists proclaim the freedom of the air for the aero-

nauts of all countries, English legislators, with the support of English jurists, are establishing a control over the air above and surrounding our territory which is far more stringent than the control exercised by any State over passage on land or sea. It is open to question whether the Regulations hurriedly issued by the Home Secretary under the Aerial Navigation Amendment Act passed but a few weeks ago do not leave something to be desired by the international jurist, who, while upholding the State's sovereignty over the air above its territory, nevertheless desires, so far as is consistent with public security, to leave the air free as a highway for innocent passage. Under the Regulations a foreign aeronaut is debarred from landing on English shores save within certain prescribed areas; he must send a notice to the Home Office of his proposed landing place within those areas, together with the approximate time of his arrival; he must obtain a clearance from a British consular agent in the country where he starts his journey; on his arrival within the English jurisdiction, he must get a fresh permit from the local authority to continue his journey, and must carry at least one British representative on his air-craft; nor may he carry any photographic apparatus within the realm. The effect of these Regulations, which are sanctioned by a penalty of imprisonment for six months and a heavy fine in money, is virtually to close the air-space above the British Isles to foreign air-craft. Doubtless, in the past the absence of Regulations has been a source of anxiety, and the interests of national defence are of paramount importance. But it may be expected that larger experience may enable the authorities in the future to restrict less narrowly the freedom of the navigation of the air. And for the moment, perhaps, this emphatic assertion of national sovereignty will, so to speak, clear the atmosphere of the dread of nocturnal expeditions and flying spies.

THE DEVELOPMENT OF INTERNATIONAL COURTS.—A conference is now sitting at Madrid for the purpose of formulating a plan for the establishment of "Mixed Courts" at Tangier which shall have jurisdiction in cases between foreign subjects of different nationalities and foreign subjects and natives. The regime of the Capitulations under which the subjects of Christian countries, living in Oriental

and non-Christian States, are entitled to have actions brought against them tried before the Consul of their nation is ill-suited to communities engaged in trades which are cosmopolitan in character. The Consular Courts have compulsory powers only over the subjects of their own nation, and where the parties to an action are nationals of different States and do not consent to submit to a single jurisdiction, different parts of the dispute may fall to be determined by different tribunals, and the execution of the judgments may be defeated altogether. The difficulties of justice involved in the old system led Nubar Pasha in 1879 to establish in Egypt the Mixed Courts, composed of Judges of a number of European States, which were destined to be a powerful machine for securing payment from the Egyptian Government for foreign creditors. In spite of defects of procedure it is generally recognised that the Mixed Courts have been a vast improvement on the old anarchical system, and their organisation will presumably form the model on which the representatives of the Powers will design the proposed international Courts at Tangier. It should be possible, however, to improve considerably on the original. The jealousies of the States concerned with the modification of the Capitulary rights in Egypt led, on the one hand, to the reservation of the criminal jurisdiction for the Consular Courts, and, on the other hand, to an insistence on the presence of fifteen and five Judges respectively in the Court of Appeal and of First Instance. To-day we are more accustomed to the idea of an international judiciary, and there is greater confidence in its working, so that it is reasonable to expect that the Mixed Court of Tangier will be endowed with a larger jurisdiction than those of Egypt, and will also be less wasteful of judicial power in its composition. In the development of mixed European judicial tribunals in Oriental countries, there is an indication of the growing recognition of common legal interests and a common basis to legal systems which must lead, in time, to the consummation of a single commercial law for civilised peoples.

PLEDGE BY EXECUTOR OF TESTATOR'S CHATTELS. — An executor, or one of several executors, may validly pledge any part of the testator's personal estate, whether cleared of debts or not, at any distance of time from the testator's death.

And the pledgee, acting in good faith, is under no obligation to inquire into whether the pledge is or is not required for the purpose of administration. That proposition is so well settled and recognised as to render scarcely needful the citation of any authority in support thereof. But the statement of Sir John Leach, V.C., in *Watkins v. Cheek* (2 Sim. & Stu. 199) was referred to by the Master of the Rolls (Cozens-Hardy) in the recent case of *Solomon v. George Attenborough and Son* (106 L. T. Rep. 87; affirmed by the House of Lords, noted *ante*, p. 83) as accurately and tersely expressing the rule of law on the subject. The rule, however, has no application to a case like that one, in which the executor had not acted nor in any way purported to act in his capacity of executor. That appears from what was decided by the Court of Appeal and lately approved by the House of Lords. The whole question is whether the pledgee was dealing with an executor acting in virtue of his powers or not. It was shewn there that the pledge of certain chattels that formed part of the testator's estate was not required for any of the purposes of the administration; and that the chattels were, at the time, held by the pledgor as a trustee and not as an executor. There was not the slightest blame to be attached to the pledgees in the transaction. They took the chattels in good faith under a contract of pledge in the usual form, and in the ordinary way of their business as pawnbrokers. They were perfectly unconscious of any fraud, and they were not open to any imputation in the matter. No notice that the chattels were not the absolute property of the pledgor was given to them. Nevertheless, they were held to be disentitled to retain the chattels because of that single circumstance: The executor had neither acted, nor professed to be acting, as such. For that reason, the authorities upon which Mr. Justice Joyce had based his decision in the Court of first instance—namely, *Re Whistler and Richardson* (57 L. T. Rep. 77; 35 Ch. Div. 561) and *Re Venn and Furze's Contract* (70 L. T. Rep. 312; (1894), 2 Ch. 101)—were considered by the Court of Appeal to be distinguishable. Where an executor deals as executor with another person, the latter is justified in assuming that the executor is discharging the duties of the position which he professes to hold. So it was in the two cases which Mr. Justice Joyce regarded as authorities in point; and likewise in *Re Tanqueray-Willaume and Landau* (46 L. T. Rep. 542; 20 Ch. Div. 465). The vendor

was known by the purchaser to be an executor, and purported to be dealing in that capacity. No authority was able to be cited that places on the same footing a transaction in which the vendor or pledgor does not purport to deal as executor. The purchaser or pledgee has no right then to rely on the fact that he has been dealing with a person who really is an executor. In the present case, the Lord Chancellor (Lord Haldane), who delivered the judgment of the House of Lords, pointed out that an executor, by virtue of his office, has vested in him the *plenum dominium* over his testator's chattels. But when the owner of a chattel pledges it to a pawnbroker he is not parting with the *plenum dominium* over it, or with anything in the nature of a title to the pawnbroker. The pledgor in the present case had no property in the chattels as executor at the time he delivered them to the pawnbroker. There was, therefore, no question of an executor acting within his powers. The dishonesty of persons who pledge is one of the risks that pawnbrokers have to guard against in so far as lies in their power. And any other decision than the present would have involved gross injustice to the true owners of the chattels.

THE EFFECT OF BANKRUPTCY OF A PURCHASER OF LAND BEFORE COMPLETION OF THE PURCHASE.—The position of a vendor of land who, after the contract has been entered into and before completion, gets notice of an act of bankruptcy by the purchaser is not as clear as it might be. Bankruptcy does not of itself put an end to a contract: (see *Valpy v. Oakley*, 17 L. T. Rep. O. S. 124; and Dart's Vendors and Purchasers, vol. 1, p. 294, 7th edit.) If the vendor have notice of such an act of bankruptcy he cannot safely proceed with the contract until it has been ascertained whether or not adjudication in bankruptcy ensues; for any money paid to him by the purchaser might be recovered back by the trustee under a consequent adjudication of bankruptcy against the purchaser: (see *Ponsford, Baker, and Co. v. Union of London and Smiths Bank Limited*, 95 L. T. Rep. 333; (1906), 2 Ch. 444; and Mr. T. Cyprian Williams' work on Vendor and Purchaser, p. 552, 2nd edit.). On the other hand, a purchaser who has committed an act of bankruptcy available for adjudication cannot enforce specific performance of the contract against the vendor: (*Franklin v. Lord*

Brownlow, 14 Ves. 559). One remedy which seems open to the vendor if the day fixed for completion has passed, and either time is of the essence of the contract, or a reasonable time has elapsed for its completion, is to treat the contract as broken, and forfeit the deposit: (see *Collins v. Stimson*, 48 L. T. Rep. 828; 11 Q. B. Div. 142). Another course would be to make a written application to the trustee in bankruptcy requiring him to decide whether he will disclaim the contract or not, and if he does not disclaim within twenty-eight days, or withing such further period as may be allowed by the Court, he will be *deemed to have adopted* the contract. The precise effect of these last words is doubtful. It would appear that they render the trustee liable to complete the contract so far as he can do so with the assets of the bankrupt, but they do not make the trustee personally liable on the contract. It is submitted in *Williams on Bankruptcy Practice*, p. 295, 9th edit., that they only effect a novation by which the trustee, as representing the body of creditors, is substituted as the party liable for the trustee as representing the old bankrupt contractor: (see *Re Sneezum*, 35 L. T. Rep. 389; 3 Ch. Div. 463). Although the Bankruptcy Act 1883 gives numerous powers to the trustee, it gives no express power to perform the bankrupt's contracts generally. Express power, however, is given to the trustee with the permission of the committee of inspection to bring actions relating to the property of the bankrupt; and also to make such compromise or other arrangement as may be thought expedient with respect to any claim arising out of or incidental to the property of the bankrupt made or capable of being made on the trustee by any person or by the trustee on any person. Therefore it is submitted that with the sanction of the committee of inspection the trustee may carry out the contract, or may make some other arrangement with reference thereto. Specific performance, however, cannot be decreed against the trustee in bankruptcy of the purchaser without his consent (see *Holloway v. York*, 25 W. R. 627), for the Court will not assist one creditor at the expense of the others to get 20s. in the pound, though the contract may be enforced against the trustee in bankruptcy of a vendor: (see *Pearce v. Bastable's Trustee in Bankruptcy*, 84 L. T. Rep. 525; (1901), 2 Ch. 122). If the trustee disclaims the contract, the vendor may retain the deposit even without express stipu-

lation for that purpose: (see *Ex parte Barrell; Re Parnell*, 33 L. T. Rep. 115; L. Rep. 10 Ch. 512). Another remedy open to the vendor for what it is worth is to apply to the Court under sec. 55 (5) of the Act for an order rescinding the contract on such terms as to payment by or to either party of damages for the non-performance of the contract or otherwise as to the Court may seem equitable, and any damages payable under the order to any such person may be proved by him as a debt under the bankruptcy.

SATISFACTION.—It is well settled that when a father or person *in loco parentis* has covenanted to pay a portion to a child, and afterwards gives a legacy of the same or a larger amount to that child, the legacy is *prima facie* a satisfaction of the portion, and, if the legacy is of smaller amount, it is a satisfaction *pro tanto* (Theobald on Wills, 7th edit., p. 759); but a point which is not quite so clearly present to the mind of practitioners is that that doctrine has no application to the case where the advance is made before the date of the will. In such a case the will does not operate as an ademption in the absence of a special agreement that it shall. *Upton v. Prince* (Cas. t. Tal. 71) is an old authority on this point. There the testator had two sons, William and Peter, and four daughters, and in his lifetime he gave his two sons £1,500 apiece, for which he took their receipts acknowledging that such sums were to be on account and in part payment of what the father should give them by will. Then by his will the testator recited that he had advanced to three of his children, naming them, £1,500 each, omitting any mention of Peter, to whom he had also advanced £1,500; and he thereby gave to his three other children, including Peter, £1,500 apiece, and then gave the residue equally among all his children. It was argued on behalf of Peter that the omission of his name by the father in the recital of advancement shewed that he plainly intended a difference between his sons, the receipts given by both and the case of both being the same. The decree was that the £1,500 received by Peter in his father's lifetime was a satisfaction for what the father had given him by his will, and that he should not have another £1,500. In *Taylor v. Cartwright* (26 L. T. Rep. 571; L. Rep. 14 Eq. 167) the facts, so far as material, were shortly as follows: A testatrix died in 1848 having by

her will, made the day before her death, bequeathed one fourth of the residue of her personal estate to two of her sons in trust for her daughter A., then the wife of T., for her life for her separate use without power of anticipation, and on her death for her children. The testatrix left four children. In 1850 a family arrangement was entered into under which the property was divided into fourths. Her fourth was calculated on the footing of her having received £400 from the testatrix in her lifetime, which sum was accordingly deducted from her share. In 1850 A. executed a release containing a recital that the £400 had been advanced by the testatrix in her lifetime with her husband's consent "in part of and to be deducted out of any legacy or sum of money which the testatrix might leave by will to A. or her issue." A. died in 1870, and thereupon her children filed a bill against the personal representatives of the trustees of the will to make good the £400, and it was held that the plaintiffs were entitled to a decree. Vice-Chancellor Wickens in the course of his judgment said: "There is no presumption of law that the payment of a sum of money to a child, even by a father, before the date of the will is to go against a legacy to that child. If there be a contract by the child that it shall do so, as in *Upton v. Prince*, that contract may be perfectly valid;" and see *Re Peacock's Estate* (L. Rep. 14 Eq. 236). In this connection the recent decision of Mr. Justice Warrington in *Re Shields; Corbould-Ellis v. Dales* (106 L. T. Rep. 748; (1912), 1 Ch. 591) may be shortly referred to. There a testator by his will, dated in 1908, gave a legacy of £300 to his housekeeper, nurse, and faithful servant X. In 1909 he wrote a letter to her, enclosing a cheque for £300, and stating that this sum was to be instead of the £300 left to her in his will. In 1910 the testator took the cheque out of the letter in the presence of the legatee and resealed the letter, the contents of which were not known to her until after the death of the testator. Later in the same year the testator placed a sum of £300 in the bank in the joint names of himself and the legatee with power for either of them to draw upon it. The testator died in 1911 without having altered or revoked his will. Held, that the legacy of £300 had not been adeemed by the gift of £300, which was a clear gift unaccompanied by conditions, and that the letter could not be admitted as evidence to prove that the testator intended that the gift should be in substitution for the legacy.

CROSS-EXAMINATION OF HOSTILE WITNESSES.—An interesting point was raised, though not decided, by the Court of Criminal Appeal this week. A witness called for the Crown, in a trial for murder, when giving evidence at the assizes, gave evidence directly opposed to her statements made before the Justices, and was then, by permission of the presiding Judge, cross-examined by counsel for the Crown, on the ground that she was a hostile witness. On appeal, the question was raised whether the decision of the learned Judge in allowing this course to be taken could be the subject of an appeal under the Criminal Appeal Act 1907. By sec. 3 of 28 & 29 Vict. ch. 18, popularly known as Denman's Act, "A party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the Judge, prove adverse, contradict him by other evidence, or, by leave of the Judge, prove that he has at other times made a statement inconsistent with his present testimony. . . ." The word "adverse" has been construed to mean "hostile," and not merely unfavourable: (*Greenhough v. Eccles*, 5 C. B. N. S. 786). The discretion of the Judge to give or refuse leave to a party to cross-examine his own witnesses is absolute, and is not appealable, nor the subject of a ground for a new trial. This was decided in *Rice v. Howard* (16 Q. B. Div. 681), a case decided on a section of the Common Law Procedure Act 1834, exactly similar in terms to that quoted above. Denman's Act first applied the same principle to criminal cases, both Acts introducing an innovation into the former practice, for, formerly, a person calling a witness was bound by the evidence he gave, and could not shew that any other time he had given a different account of the same transaction: (*Ewer v. Ambrose*, 3 B. & C. 746). Now, of course, if a witness appears evidently hostile to the party calling him, leading questions may be put to him with the permission of the Court: (*Price v. Manning*, 61 L. T. Rep. 537). It was pointed out very recently in the case of *Ex parte Bottomley and others* (100 L. T. Rep. 782) that the Court has a complete discretion as to the allowance or disallowance of leading questions in examination in chief, not controllable by any Court of Appeal. This power or discretion seems to belong to the Court independently of any statutory enactment. With regard to appeals in criminal cases, it would appear, however, that the Judge's ruling in a ques-

tion of this kind might be the possible subject of appeal. Thus, sec. 3 of the Criminal Appeal Act, 1907, gives, *inter alia*, a right of appeal on "any other ground which appears to the Court to be a sufficient ground of appeal;" whilst by sec. 4 the Court has power to allow the appeal in certain cases, or if they think that "on any ground there was a miscarriage of justice." The question whether the Court will entertain an appeal from the discretion exercised by the presiding Judge at a criminal trial, as to treating a party's witness as hostile, or allowing the provisions of Denman's Act to be enforced, was, however, expressly left open by the judgment of the Court of Criminal Appeal.

CONSTRUCTIVE MURDER.—A recent ruling of Mr. Justice Darling at the Central Criminal Court as to the distinction between murder and manslaughter has raised some comment in the Profession. A woman charged with the wilful murder of another woman, by shooting her, raised the defence that, having received great provocation from her husband and the woman, she intended to shoot him and herself, but by mistake shot the other woman. It was contended on her behalf, and the learned Judge charged the jury to the same effect, that such facts, if proved, might amount only to manslaughter if the husband were killed, and might justify a verdict of manslaughter in the case in question. The tendency of the Courts to narrow, rather than to enlarge, the cases which come within the category of "constructive" murder is well known, but the old rule still obtains that if a person, whilst doing or attempting to do another act, undesignedly kills another person, if the act amounted to felony, the killing is murder; if merely unlawful, manslaughter. Manslaughter is a felony, and it seems somewhat difficult to reconcile the above ruling with the old-established rule of law.

APPAREL LOST AT RESTAURANTS OR ENTERTAINMENTS.—When seeking to ascertain the incidence of the damage to, or loss of, any apparel at a restaurant or other place of entertainment, it is very interesting, and quite as important, to note incidents which a layman may consider quite immaterial; in other words, to discover whether the customary liability of an innkeeper for the safe custody of a guest's

goods, or a contract of bailment (gratuitous or for reward), or any other contract *in te vivos* is, in truth, at issue. It is scarcely necessary to remind the reader that one of the few positive duties known to English law is that, arising by the custom of the realm quite independently of any contract between the parties whereby an innkeeper insures the safety of his guest's chattels left within his inn (even against injury of theft by a burglar, by his servant, or by another guest), in the absence of any act of God or of the King's enemies, or of any negligence of the owner: (*Robbins v. Gray*, 73 L. T. Rep. 252; (1895), 2 Q. B. 501). And for our present purpose it is material to remember that this duty, onerous and extraordinary as it is, attaches notwithstanding there has been no delivery of the chattels to the innkeeper or his servants, and no food or lodging having been supplied or found at the time of the loss (*Wright v. Anderton*, 100 L. T. Rep. 123; (1909), 1 K. B. 209), and notwithstanding the true owner of the chattels does not pay for the food or lodging supplied: (*Gordon v. Silber*, 63 L. T. Rep. 283; 25 Q. B. Div. 491; *Wright v. Anderson*, *ubi sup.*). And the innkeeper's pecuniary liability is only limited by the Innkeepers' Liability Act, 1863 (26 & 27 Vict. ch. 41), which legislation, as it affects the present inquiry, amounts to this, that where the innkeeper can prove that a complete (*Spice v. Bacon*, 36 L. T. Rep. 896; 2 Ex. Div. 463) print in plain type of the exempting section of the Act was exhibited "in a conspicuous part of the hall or entrance of the inn," and neither the innkeeper nor the guest proves that the injury or loss was due to negligence for which the other is responsible, then, although the value of the article or articles of apparel lost be more than £30, the guest can recover no more than that sum: (*Medawar v. Grand Hotel Company*, 64 L. T. Rep. 811; (1891), 2 Q. B. 11).

It is, we think, so extremely important in the case of a damage or loss to discern, in the very first place, whether the remedy arises from the owner being a guest at an inn, or from a liability as bailee either gratuitous or for reward, or for some other relationship existing between the owner and another person, and then, having done so, to keep the fact ever in mind, that we will select four suggestive and typical illustrations which may further elucidate the problem, and exhibit its many undecided difficulties.

1. Suppose that a wayfarer or traveller goes to an hotel to get a meal, and on entering the dining room hangs an overcoat on a peg; and that when he finished his repast, the coat is missing. Here there is sufficient evidence to establish the relation of innkeeper and guest, so as to make the hotel proprietor liable for the loss—subject, of course, to the limitation imposed by the Innkeepers' Liability Act—without proof of negligence on his or his servant's part, unless he can prove the loss arose from the negligence of the guest: (*Orchard v. Bush and Co.*, 78 L. T. Rep. 557; (1898), 2 Q. B. 285). And if, instead of being missing, the coat were found to be injured, the innkeeper would be liable for the injury, subject to the like limitation, as it seems clear that no just distinction as regards responsibility can be established between injury and loss: (*Day v. Bather*, 2 H. & N. 14).

2. Again, take the case of a man, whether a traveller or not, entering a restaurant, not attached to or part of an hotel, who finds a waiter in the vestibule or at the door of the dining room taking the customers' coats, sticks, &c. The mere fact that this waiter took the man's chattels, and disposed of them where he (the waiter) chose, would be evidence upon which a jury might properly find that the restaurant-keeper was a bailee of the chattels, and, accordingly, liable as a bailee should injury or loss occur; and this because such a practice does, or even might, add to the popularity and distinction of the establishment, and was probably adopted by the proprietor or manager with that very object in view: (per Mr. Justice Charles in *Ultzen v. Nicols*, 70 L. T. Rep. 140; (1894), 1 Q. B. 92).

3. Thirdly, suppose that a man (traveller or not) enter a restaurant, or a "tea shop," and a waiter, without being asked, takes his hat and hangs it upon a hook behind him, and suppose that, while he is enjoying his meal, the hat disappears. Now, a person cannot be made liable as a bailee without his consent; and it has to be confessed that these assumptions present a vexatious and troublesome question whether they shew a bailment of the hat, or merely a taking of the hat as an act of good nature, or an act of service, and without any intention of taking charge of it. Still, on the whole, they present evidence upon which a jury might find a bailment, and, if so, more assuredly, that the restaurant-keeper was guilty of negligence while the hat was in his custody, owing to want of reasonable care on his part:

(*Ultzen v. Nicols, ubi sup.*; and cf., as to the negligence, *Phipps v. New Claride Hotel*, 22 Times L. Rep. 49; *Bullen v. Swan*, 23 Times L. Rep. 258; *Giblin v. McMullen*, L. Rep. 2 P. C. 317).

4. Lastly, at a subscription dance or concert held in a country institute or assembly room, a subscriber leaves his overcoat in the cloak room, and it is afterwards found missing. The evidence may negative a bailment with the entertainment committee, and as to any breach of an implied contract by the committee to take proper care of any chattels so deposited, it may be negated by the low price of the tickets: (*Baker v. Cain, Times*, 23rd Nov., 1812, p. 3).

It is evident, therefore, that if the place visited be not an inn, the customer must shew some express or implied contractual obligation, or a bailment. And the reader may have concluded, and we think correctly, that the traveller in the first case would have had to suffer the loss if the place he had gone to had not been an inn, because he did not deliver his overcoat to the innkeeper or one of the servants, and, as every lawyer knows, and the derivation of the word "bailment" suggests, delivery of the chattel in trust is essential to a bailment of it. In the second case a small cloak-room charge might have been demanded and paid; and, therefore, it will be useful to recall that a bailment may be either for reward or gratuitous, and that this distinction affects, and very reasonably so, the degree of diligence which is expected of the bailee. And whenever the place is not an inn, it may be worth considering whether the responsibilities of a boarding-house keeper, or at least some of them, which were a few years ago discussed and enunciated in a case in the Court of Appeal (*Scarborough v. Cosgrave*, 93 L. T. Rep. 530; (1905), 2 K. B. 805), do not also attach to the proprietor of the establishment in question; and further to bear in mind that if liability for injury or loss exist, it would not be limited to £30.

It appears, then, that in a case of customary liability, a plaintiff has to, if it be possible, prove he visited an inn (see *Thompson v. Lacy*, 3 B. & Ald. 286), and that the relationship of innkeeper and guest, in the legal sense of these terms, arose. In this connection we would point out that when Mr. Justice Wills stated (*Orchard v. Bush and Co., ubi sup.*) that, from the point of authority, he did not think that there was much to be said for the proposition that the term

"guest" is to be limited to a wayfarer, and that the liability of an innkeeper arises whenever he receives a person *causa hospitandi* or *hospitii*, it was *obiter*, as the plaintiff in the case was held to be, and clearly was, a traveller; and, with great respect for that learned Judge, we must add that this dictum appears to be inconsistent with other cases (*e.g. Burgess v. Clements*, 4 M. & S. 306; *Reg. v. Rymer*, 35 L. T. Rep. 774; 2 Q. B. Div. 136; *Lamond v. Richards*, 76 L. T. Rep. 141; (1897), 1 Q. B. 541). We should be glad if the meaning of the term came again shortly for consideration and judgment; as we are inclined to think it is still arguable that a person who dines at an inn in his town, and then returns home, or goes on to the play or a ball, is not a "guest," and must, accordingly, frame his case irrespective of the fact that the place he visited was an inn.

The conclusion we must reach is that there are several nice points in this very everyday subject which, it may fairly be said, are as yet uncovered by decision, and remain of a very difficult and somewhat controversial nature. Each adviser will doubtless have, now and again, to make inferences which do not admit of rigid proof by precedent, or of support by *obiter dictum*. And there is perhaps, an advantage in this state of things. For elasticity enables those who have to administer a law to adapt it the more readily to the modern requirements of the age.

"CONFINED AS A PATIENT IN A HOSPITAL."—The popular notion nowadays of the meaning that is ascribable to the word "hospital" is markedly different from that which lawyers always entertain concerning it. Thus, to anyone not having access to Stroud's Judicial Dictionary, a refuge where the sick and injured are medically and surgically treated is simply the meaning that "hospital," standing alone, conveys to the mind. But reference to that admirable compilation shews that the interpretation which Judges have from time to time thought proper to place upon that word is far more extended. For their Lordships bear in recollection the original very wide meaning thereof. Any place of lodgment might be a "hospital" in the ancient meaning of the word, as Mr. Justice Bruce pointed out in *Moses v. Marsland* (83 L. T. Rep. 740; (1901) 1 K. B. 668). The true modern meaning, however, is a building

appropriated not only for the reception of sick and injured persons, but also for the aged, or infirm, poor. That appears plainly enough from what was said by Lord Watson when delivering the considered judgment of the Judicial Committee of the Privy Council in *Dilworth v. Commissioner of Stamps* (79 L. T. Rep. 473, at p. 476; (1899) A. C. 99, at p. 107). So, likewise, from the remark of Chief Justice Holt in *Philips v. Bury* (2 T. R. 353), that a "hospital is for those that are poor and mean and low and sickly." But even so, the line had to be drawn somewhere, as it was in the recent case of *Ormskirk Union v. Lancaster Union* (107 L. T. Rep. 620). The question there raised was whether a female pauper lunatic who, before being confined in a county lunatic asylum, had resided in a house established for the relief of deserving poor, aged, helpless, and afflicted persons, had been "confined as a patient in a hospital," within the meaning of the proviso to sec. 1 of the Poor Removal Act 1846 (9 and 10 Vict. ch. 66). If so, she would, by virtue of that enactment, be prevented from becoming exempt from removal to the parish of her settlement. As appears from our report, imbeciles and persons suffering from epilepsy and contagious diseases were not admitted to the house in question, nor persons requiring skilled nursing or constant medical attendance. The house was established principally as a home for the education and training for service of orphan and deserted Roman Catholic children, and as a refuge for the aged poor. The pauper lunatic referred to was a voluntary and ordinary inmate doing domestic duties and receiving no special medical attention. Under these circumstances, the Divisional Court, consisting of Lord Alverstone, C.J., and Justices Channell and Avory, were of opinion that, having regard to the nature of the institution, it would be wrong to describe it as a "hospital," within the meaning of the proviso to sec. 1 of the Act of 1846. In *Ormskirk Union v. Chorlton Union* (87 L. T. Rep. 446; (1903) 1 K. B. 19; affirmed on appeal, 89 L. T. Rep. 256; (1903) 2 K. B. 498), the Court of Appeal held that a "home" which was used for the reception of patients suffering from illness was a "hospital" within the meaning of the same proviso. And that case was relied upon as an authority in favour of a similar decision in the present case. But there was not much difficulty found in

distinguishing it. Although, as was observed by Mr. Justice Channell, it was a matter of some doubt, there does not appear to be anything wrong in the conclusion arrived at by the Divisional Court. Unquestionably, a wide meaning ought to be given to the phrase "patient in a hospital" in the proviso especially having regard to the explanation it has received in former cases. All the same, to say that those words mean an inmate of a charitable institution, like the particular one in the present case, would seemingly be going farther than is warranted by previous decisions.

LEGACY PAYABLE OUT OF REVERSIONARY FUND.—The important question whether a legacy which is directed to be paid out of a reversionary fund carries interest as from the expiration of a year after the death of the testator, or not until the reversionary fund falls into possession, has at length—for it is the first time, seemingly—been dealt with by the House of Lords. It was raised in the recent case of *Walford v. Walford* (107 L. T. Rep. 657). And the decision of the Court of Appeal thereon (see 105 L. T. Rep. 739), in favour of the former view, met with the entire approval of the learned Lords. Mr. Justice Joyce, in the Court of first instance, had, on the contrary, held that the question was governed by the decision of Sir John Romilly, M.R., in *Earle v. Bellingham* (No. 2), (24 Beav. 448). In that case, the learned Judge expressed the opinion that the period from which interest was payable on legacies payable out of a fund to which a testatrix was entitled on the death of a certain person was the time when the right to receive the legacies accrued. That is to say, the period to be regarded was the death of the person in question and not the death of the testatrix. And Mr. Justice Joyce had certainly ample excuse for adopting that view. For *Earle v. Bellingham* (No. 2), (*ubi sup.*) is treated in the text-books as laying down good law: (see Jarman on Wills, 6th edit., p. 1108; and Theobald on Wills, 7th edit., p. 189). Moreover, the principle of that decision has been accepted as sound in several reported cases: (see *inter alia*, *Re Lud-*

lam; *Ludlam v. Ludlam*, 63 L. T. Rep. 330; and *Re Gyles; Gibbon v. Chaytor*, 1907, Ir. Rep. 1 Ch. 65). On the other hand, it was considered by Lord Rardwicke that because a legacy was made payable out of a reversionary fund it made no difference to the time of payment of interest. At any rate, his Lordship in *Lloyd v. Williams* (2 Atk. 108, at p. 110), stated that he knew of no distinction, in respect of the carrying of interest, "between a reversionary estate and any other." The whole question turns upon whether it can be said that, when a legacy is directed to be paid out of a reversionary fund, that necessarily involves that a particular time is fixed by the will for payment of the legacy. If so, that time must be treated as the date from which the interest begins to run, as appears from what was said by Lord Cairns in *Re Lord's Estate; Lord v. Lord* (17 L. T. Rep. 105; L. Rep. 2 Ch. App. 782, at p. 789). But in the present case of *Walford v. Walford* (*ubi sup.*), there was no express direction in the will of the testator as to the time for payment of the legacy. There was nothing to the effect that payment was to be postponed until the date when the reversionary fund fell into possession. Nor was it the fact that the legacy was payable out of a reversionary fund which was constituted such by the testator himself. The former circumstance, if not the latter, weighed with the House of Lords, no less than with the Court of Appeal, in deciding that the legacy carried interest from the end of one year after the testator's death, in accordance with the ordinary rule: (see *Tatham v. Drummond*, 2 Hem. & M. 262; *Wood v. Penoyre*, 13 Ves. 325, at p. 333; Order LV., r. 64). Lord Haldane, L.C., who delivered what was practically the judgment of the House of Lords, was considerably more disposed than the learned Judges of the Court of Appeal had expressed themselves to be to narrow his decision down to the provisions of the particular will before his Lordship. There seems, however, little reason to suppose that, if any case arises in the future in which a legacy is bequeathed out of a reversionary fund as in the present case, the time of payment of interest will admit of serious question. But whether, if the fund were made a reversionary one by the express terms of the will itself, any different result would follow may possibly remain to be seen.

(ENGLISH.)

Tramway — Passenger — Injury — Alleged Negligence of Company—Statutory Duties and Powers—Latent Defect—Liability of Company—Bristol Tramways Act, 1894 (57 & 58 Vict. ch. 155.

The plaintiff was a passenger on the outside of an uncovered tramway car belonging to the defendants, which was propelled by means of overhead electric traction. The wheel at the head of the trolley arm came away from the electric wire, and the trolley arm was detached from the standard and fell upon the plaintiff's head. This was due to the fact that the head of the trolley arm did not come off, but caught in the transverse tie, and the momentum of the car pulled the standard out of the socket. It was proved beyond doubt that such an occurrence was extremely rare, and that nobody knew precisely why it happened, and no contrivance had yet been discovered to prevent it. The plaintiff proved that the blow on his head was caused by the fall of a part of the apparatus on the car, and contended that there was *prima facie* evidence of negligence. The defendants called a number of witnesses, including distinguished experts. Their evidence to the following effect was not substantially shaken: (1) The system adopted was the best and most widely used overhead system of electric traction; (2) the apparatus on this particular car was in perfect order, and there was no patent defect in workmanship; (3) there was no negligence on the part of the driver or the conductor. No rebutting evidence was called. The plaintiff in his statement of claim gave certain particulars of alleged negligence, and the cross-examination of the defendants' witnesses was addressed to establishing these particulars. It was also attempted to shew that the defendants had not made any experiments with a view to protecting the passengers in the event of the trolley arm falling, and this was relied on as negligence. An action was accordingly brought by the plaintiff against the defendants claiming damages in respect of the injuries sustained by him. At the trial of the action before Channel, J., and a special jury at Bristol, the learned Judge in his summing up to the jury said that the plaintiff could only be entitled to recover damages if there was negligence on the part of the defendants in carrying him as a passenger; that the defendants were not insurers; and that they were bound to take

every reasonable precaution that could be taken to secure the safety of their passengers, but not as insurers. His Lordship asked the jury, if they thought there was negligence, to tell him what the negligence was that caused the accident. The jury found for the plaintiff with £150 damages, but stated that no one of the alleged acts of negligence of the defendants was established to the satisfaction of the jury. The defendants applied for judgment or a new trial.

Held (*dissentiente* Farwell, L.J.), that the verdict of the jury shewed that the defendants discharged the burden which rested upon them; that the only negligence was disproved notwithstanding the plaintiffs *prima facie* case; that the standard of care required in the case of a carrier of passengers was not so high as the plaintiff contended; that it was sufficient that the carrier should adopt the best known apparatus kept in perfect order and worked without negligence by the servants he employed; and that if the carrier did that he ought not to be responsible for the consequence of an extremely rare and obscure accident which could not in a business sense be prevented by any known means. Application allowed.

[*Newberry v. Bristol Tramways and Carriage Company Limited*. Ct. of App.: Cozens-Hardy, M.R., Farwell and Hamilton, L.JJ. Dec. 17, 18, and 20, 1912.—Counsel: for the appellants, Clavell Salter, K.C., and T. W. H. Inskip; for the respondent, Foote, K.C., and B. R. Vachell. Solicitors: for the appellants, Stanley, Wasbrough, Doggett and Baker, agents for Stanley, Wasbrough, and Doggett, Bristol; for the respondent, Ford and Ford, agents for Metcalfe and Lefroy, Bristol.]

MARRIAGE AND DIVORCE IN FRANCE.

By Charles G. Loeb, Esq., Counsellor-at-law, of Valois & Loeb, Paris, France.

It is only since the French Revolution that marriage is considered in France as essentially a civil contract. This principle, first established by the Constitution of 1791 in France, has been consecrated ever since by the laws of this Republic, and the Penal Code at this day forbids any minister of any cult to give a marriage benediction to persons

who have not previously justified to him that their marriage has been celebrated, by the competent civil officers, that is to say by the mayor of the town or district in which one of the parties has resided for at least one month.

With the consent of their parents, a boy may marry after eighteen and a girl after fifteen years.

Before the age of twenty-one, however, neither boy nor girl can marry without the consent of his father and mother. In case the parents disagree, the consent of the father suffices. Should the parents be deceased, the grandparents replace them.

Children who have attained the age of twenty-one, but have not yet reached thirty, must justify of the consent of their parents. This means that, should the consent not be obtained, it may be dispensed with provided certain formalities prescribed by the Code, called "*sommations respectueuses*" have been fulfilled. The person in this condition must serve upon the parents refusing to consent a summons in due form of law calling upon them to agree to the wedding. Should the parents refuse, the marriage may take place nevertheless after thirty days from the service of this paper and will be perfectly valid in spite of the parents' dissention.

After the age of thirty, no consent of the parents is necessary.

The essence of the marriage contract in France is the consent of the parties.

The marriage must be preceded since the law of 1907 by the publication of bans. These bans are put up on the walls of the city hall of the domicile of the parties ten days previous to the marriage of the parties and the act of marriage is transcribed on the margin of the birth records of each one of the parties in order to avoid bigamy.

The Civil Code in France renders valid all marriage in a foreign country between French citizens or between a French citizen and a foreigner, provided this marriage was celebrated in the legal forms in force where the marriage takes place, provided also that the marriage has been preceded by publication of bans, and provided also that all the conditions prescribed by the French Code as to age, consent of parents and publication of bans have been fulfilled.

The French law gives to foreigners marrying in France the full benefit and force of their "national law," that is

to say that the legal age for marriage, the consent of their parents and the question of publication of bans at their domicile is left to their national law.

The marriage contract in France involves the following obligations:—

The parties owe to each other mutually, fidelity, help and assistance; the husband promises to protect his wife and the wife promises to obey her husband (Art. 213, Civil Code France.)

The wife must reside with her husband and must follow him wherever he decides to reside; the husband is obliged to receive his wife and to furnish her with all that is necessary according to his condition and to the best of his abilities.

Divorce in France.—Divorce was established in France in 1792.

The Civil Code of 1804 consecrated the principle of divorce, but by the law of May 8th, 1816, after the downfall of the Napoleonic empire in France, divorce was suppressed. It was only in 1884 that the laws of France re-established marriage dissolution by divorce.

Under the Civil Code in force to-day in France, a divorce may be obtained upon either of the following causes:—

First, adultery of the wife or of the husband.

Second, cruelty, physical injuries or grave insults.

Third, condemnation of one of the parties for infamous crime or felony.

The tendency of the French Courts is at present towards the facilitating of the dissolution of the marriage contract.

The decisions are continually widening the scope of the causes designated as cruelty or grave insults.

Law decisions have held that letters containing insulting words from a husband to his wife, or reciprocally, constitutes grave injuries and were sufficient as a basis for a divorce.

To abandon the conjugal domicile, to refuse to consummate the marriage or to continue the marriage relations, to use any incorrect familiarities with third parties, to communicate dangerous sickness and many other causes have been held to constitute grave insults and to be sufficient causes for divorce.

Procedure.—Divorces are pronounced by the Civil Court in France. These judgments may be appealed from.

The procedure comprises:—

First, an attempt to conciliate the parties by the President of the Court.

If this does not succeed, and the facts alleged are clearly proven, the divorce judgment is granted *de plano*.

If the facts are contestable and contested, the Court orders an investigation and each one of the parties may call forth witnesses.

The divorce may be either pronounced in favour of one of the parties or "*a leurs torts reciproques*," which means by the wrong doings of both.

There are two months for appeal after the rendering of the judgment. No appeal being taken, the divorce then becomes absolute, but has no effect or force until it is actually transcribed on the books and registers of the city hall in the margin of the Marriage Act. This last formality is essential.

A man may marry immediately after a divorce, but a woman must wait 300 days after the granting of the decree. This law has been made to avoid any question as to the paternity of a child born or conceived during the said period.

The French Court, by the judgment of divorce, dissolves absolutely the marriage contract and gives to each of the parties their entire liberty.

The Courts may arrange in their judgment all property rights and questions between the parties and have power to grant alimony.

The question of the guardianship of the children is also settled in the judgment.

Divorces are becoming more and more frequent in France, specially in the largest cities. The Courts are becoming more and more liberal in their interpretation of the laws of divorce and are extending, by interpretation, the scope of the causes prescribed by the Code.

The law and the Courts seem to be tending gradually and surely towards the simplest solution for matrimonial dissention: The divorce by mutual consent.—*From the Va. Law Reg.*

LORD CHIEF JUSTICE HOLT.

THE UPRIGHT AND FEARLESS JUDGE.

For over six hundred years, since the reign of Edward I., justly styled—"The English Justinian," the duties and status of the office of Chief Justice of England have undergone but slight change. From the time of the Norman Conquest, in 1066, to the commencement of the reign of Edward the First, in 1272, a period of over two hundred years, the high official, who superintended the administration of justice over all England, was called the Chief or Grand Justiciar. This office was created by the Conqueror preparatory to the introduction of the Feudal System in England; a position second in dignity only to that of the King, he wielded not only civil, but military power as well. The first Norman ruler decided to establish a grand central tribunal for the whole realm, and with this end in view created the famous Court, called the *Curia Regis*, sometimes called the *Aula Regis*. It consisted of the leading Peers of the realm and chief officers of state, the Constable, the Chamberlain, the Treasurer, the Marshal, and the Seneschal. It was not only to be a great Court of Appeal, but one in which all causes of importance should originate and be finally decided. The *Curia Regis*, at once the council of the King and the witenagemot of the nation, discharged judicial, administrative and legislative functions. The Grand Justiciar presided in the *Curia Regis*, and in the Exchequer, and acted as Regent, during the absence of the King. In fine he directed the whole financial and judicial arrangements of the kingdom. This great official was shorn of much of his power and dignity, when the *Curia Regis* was subsequently divided into the three great Courts or tribunals of the King's Bench, the Common Pleas, and the Exchequer. The Chief Justiciars were generally selected from such as had undergone clerical training and taken Holy Orders, since from their knowledge of civil and canon law, and from being versed in all the mysteries of the Feudal System, they seemed best fitted to discharge duties so important and diversified.

Odo, the half brother of the Conqueror, was the first Chief Justiciar of England. At an early age he had been created Bishop of Bayeaux. He accompanied his brother on the invasion of England. Donning a coat of mail, Bishop as

he was, carrying a Marshal's baton and charging at the head of the cavalry, he did yeoman's service, at Senlac, and by his valour and skill contributed largely to the victory of that fateful day. His knowledge of civil and ecclesiastical law, as well as his great ability, pointed him out as eminently fitted for the position of Chief Justiciar. He acted in a three-fold capacity; as prelate in celebrating mass in the King's Palace, as supreme Judge in the *Aula Regis*, and as Commander of the King's troops in times of war. In the list of Chief Justiciars are found the names of some of the ablest and most noted men in the annals of the times—Roger Bishop of Salisbury, Prince Henry (afterwards Henry II.); Glanville, distinguished as a soldier, statesman, and a lawyer. Glanville was considered the father of English jurisprudence. His treatise on the laws and customs of the kingdom of England is perused, even at this day, with advantage on many questions of civil rights. Coke, grateful for all he had "reaped out of the fair fields of his labours," quaintly remarks: "I will for the honour of him, and of his name, and posterity which remain to this day, impart and publish, to all future and succeeding ages, what I have found of great antiquity and of undoubted verity." Henry de Bracton, the famous law writer, was appointed Chief Justiciar, in the reign of Henry III. His great work, a complete view of the municipal law of England, in the reign of Henry II., was also highly commended by Coke. Lord Campbell says of it: "for systematic arrangement, for perspicuity, and for nervousness, it cannot be too much admired. He was rivalled by no English juridical writer till Blackstone arose five hundred years after." On the death of Bracton, in 1268, Robert Bruce, a scion of the Scottish Noble House of Bruce, was appointed Chief Justiciar, and held the office until the death of Henry III., which marked the termination of the line of Chief Justiciars.

During the reign of Edward I., the *Curia Regis* was divided into distinct tribunals, to which were assigned different classes of cases, thus giving consistency and definiteness of powers within their respective spheres of activity. These Courts, the King's Bench, the Common Pleas, the Exchequer, and the Court, afterwards known as the Court of Chancery, vested with equitable powers, were shaped and moulded in the form and on the lines on which they remained, with very slight alteration, until the year 1875,

when remodelled by the Judicature Act. The Court of King's Bench, having criminal jurisdiction, and a general superintendence over inferior tribunals, was henceforth presided over by an official, a common law Judge, denominated the Chief Justice of the King's Bench. This great law reformer, our English Justinian, determined to select his Judges, not from the clergy, who had hitherto largely monopolized all important juridical offices, but from laymen trained in the Inns of Court, those excellent nurseries of education established for instruction in the municipal or common law. He appointed Henry de Hengham the first Chief Justice of the King's Bench. From this time forth we part company with the clerical, knightly, and judicial official, hitherto known, for two centuries, as the Grand Justiciar. The salary of the first Chief Justice of the Court of King's Bench of England was a mere pittance of sixty marks, a sum barely sufficient to purchase his official robes. The Judges at the time were paid by fees on the causes they tried. Over four hundred years afterwards, the independence of the Judges was secured under the provisions of the Act of Settlement, 12 & 13 Wm. II., ch. 2 (1700 and 1701), entitled an Act for the further limitation of the Crown and better securing the rights and liberties of the subject. By this Act it was provided, Judges' commissions be made *quamdiu se bene gesserint*, and not as before during the pleasure of the Crown, and their salaries ascertained and established and made chargeable upon the whole public revenue; and further, that they could only be removed from office upon the address of both Houses of Parliament. The independence of the judicial bench was further increased by the fact, all Acts of Parliament are subject to judicial interpretation; and, also, the Bench interprets solely by reference to the words of the Act, regardless of anything said in debate, during its passage through Parliament; and the Judges, likewise, put such interpretation upon all Acts of Parliament as is in harmony with the common law principles.

The lawyers were not then subjected to the burdensome outlay incurred by the purchase of numberless reports, and expensive text books to be renewed every five years. The complete library of the practitioner of that age, consisted of the works of Glanville, Bracton and Fleta. During the reign of Edward was commenced the publication of the year

books, being notes of cases tried in the different leading Courts.

In the early part of his reign the King spent three years in the Duchy of Aquitaine. On his return he found the kingdom in a state of great disorder—open violence, robbery and judicial corruption everywhere rampant. The Chief Justice of the King's Bench and the other Judges were found to have been guilty of wholesale bribery, during his absence. The King caused them to be thrown into prison and immediately summoned a Parliament for their trial. All of the Judges, except two, were found guilty and heavily fined. The Chief Justice of the King's Bench was fined 7,000 marks. The Chief Justice of the Court of Common Pleas, De Weyland refusing trial petitioned for leave to abjure the realm, which was granted upon condition he should be attainted and forfeit all his lands and chattels to the Crown. He was compelled to walk barefoot and bareheaded, with a crucifix in his hand, to the seaside, and to be deported to foreign parts. In 1347, Sir William de Thorpe was Chief Justice of the King's Bench. At first he was supposed to be an upright and exemplary Judge. He subsequently, however, lapsed into evil ways. He was detected in several gross acts of bribery, for which he was impeached and sentence of death passed upon him, according to common tradition, although no record of his trial was preserved. Thus did the great Plantagenet deal with those, who sold, denied or delayed, right or justice.

It presents an agreeable contrast to pass from these judicial lapses to a consideration of the career of one of the most fearless and upright Judges that ever wore the ermine and graced the seat of Justice.

Sir John Holt, Lord Chief Justice of the Court of King's Bench for the long period of twenty-two years, during the reign of William III. and part of the reign of Queen Anne, stands second only to Coke as an expositor of the great underlying principles of the common law. For judicial fairness, clearness of thought and facility of expression, coupled with unbending integrity and fearless independence as well as freedom from party bias, he ranks the equal of any of the great Judges who adorn the annals of English jurisprudence. He was the son of Sir Thomas Holt, a lawyer by profession, and was born at Thame Oxfordshire, on the 30th of December, 1642. He studied at Oriel College, Oxford, and entered Gray's Inn in 1660. He applied himself

with great diligence to the study of the law and was called to the Bar in 1663. His father was an unbending Tory; the son, however, allied himself with the Whig party and became an ardent advocate of Civil and Religious liberty. He at first travelled the Oxford Circuit and was not overburdened with business. He was advised to try his luck in the Court of Chancery, but would not listen to the suggestion, for he had great contempt for the equitable system, and expressed his determination to win success in the practice of the common law. Success beyond all reasonable expectation eventually crowned his efforts. He became noted for winning verdicts in doubtful cases, and what was of more importance, for having "the ear of the Court." He gradually worked his way into a lucrative practice and often appeared as counsel in state trials.

In 1666 he was appointed Recorder of London, and shortly afterwards was promoted to the dignified position of King's Sergeant and had the honor of knighthood conferred upon him. He could not conscientiously support James II. in the exercise of his dispensing power and so expressed himself, when sitting as recorder in the Old Bailey Sessions. In a matter that came before him he emphatically declared: "That although the dispensing power claimed by the Crown had been applied, from ancient times, to statutes imposing pecuniary penalties given to the King, it could not extend to a statute imposing a test to protect the religion of the nation; and that although the King by his prerogative might enlist soldiers, even in time of peace, still, if there was no statute passed to punish mutiny, and to subject them to a particular discipline, they could not be punished for any military offence, and they were only amenable to the same laws as the rest of the King's subjects."

The appointment of the city officials being then in the Crown, the King at once dismissed Holt from the recordership and appointed a servile parasite in his place.

After the flight of James II., and when the throne had been declared vacant by those who had been members of the last Parliament, Holt exerted himself to effect a settlement by the establishment of a constitutional monarchy under the Prince and Princess of Orange. He concurred in the proceedings which resulted in the Prince summoning the Convention Parliament (so-called) and was elected a member thereof. He proved a most valuable acquisition to

his party, in assisting to carry through the terms of the settlement of the Crown upon William and Mary, as set forth in the famous Bill of Rights. Holt's speech as manager for the Commons, on the conference between the two Houses, in the Convention Parliament, was generally regarded as an able presentation of the case from a party standpoint. After the King's flight all judicial business was suspended, and the Courts in Westminster Hall closed. So corrupt and incompetent had been the Judges during the last reign, there seemed a laudable desire on the part of the new Sovereigns and their Ministers, that only the most learned and upright men in the profession should be elevated to the Bench. To avoid the charge of favouritism they hit upon the following novel expedient: They requested each Privy Councillor to bring a list of the names of twelve barristers, whom he deemed best fitted to be the twelve Judges of the three Common Law Courts, and agreed that the names of the twelve, who had the greatest number of suffrages, should receive the coveted appointments. So great was the high opinion entertained of the ability, learning, and integrity of Sir John Holt, that his name stood first on the lists of presentment of all the different Privy Councillors. Holt, subsequently, was appointed Chief Justice of the King's Bench. His appointment was hailed by the nation with general satisfaction. In 1700, after the removal of Lord Somers, King William, considering that Holt was by far the fittest man to succeed him, offered him the position of Lord Chancellor, with a peerage to follow. To his utter astonishment Holt made answer in the following memorable words: "I feel highly honoured by your Majesty's gracious offer; but all the time I was at the Bar I never had more than one cause in Chancery, and that I lost, so that I cannot think myself qualified for so great a trust."

On the accession of Queen Anne, in 1702, Holt was re-appointed Chief Justice of England and for eight years longer discharged the duties of his high office with equal satisfaction as in the past.

In 1705, Holt again refused the Great Seal. The Duchess of Marlborough, whose influence then was all-powerful, pressed him to accept it on any terms he might demand. His reply was equally decisive, saying, "He was now more unfit for it than ever, as years and infirmities were coming

upon him, and it was a day too late for him to be entering on a new career."

Chief Justice Holt's merits as a Judge appear more pre-eminent, placed in contrast with the following Judges, appointed by Charles II. and James II., Chief Justices Scroggs, Jeffreys and Wright, subservient minions of tyranny and fit instruments to trip the course of law and pluck down justice from its awful seat. These infamous Judges, who respected neither law nor common decency, whose depravity has passed into a proverb, did the work they were called to do, and did it in the most offensive and shameless manner. The hatred in which they were held stands unparalleled in English history. Scroggs escaped impeachment by the House of Commons, before the House of Lords, for treason and other high crimes and misdemeanours, by a sudden dissolution of Parliament, by the King to shield his infamous appointee. So great was the abhorrence in which he was held, the King, even, was constrained to yield to public opinion and dismiss him. It is said of him, "He ended his dissolute and shameless career, without a relative or friend to close his eyes in death. He was buried in the Parish Church of South Weald, the undertaker, the sexton and the parson of the parish alone attending the funeral." He was thus pilloried by Lord Campbell, "His name was long used by nurses to frighten children; and as long as our history is studied, or our language is spoken or read, it will call up the image of a base and bloody-minded villain. Scroggs may be considered as having been of some use to his country, by making the character of a wicked Judge so frightfully repulsive that he may have deterred many from giving way to his base propensities."

When Charles II. required a Judge to carry out some deed of shame, he did not stand upon scruples, yet, it is said, when Jeffreys was presented for acceptance, he shuddered at his very presence, saying afterwards to a Court favourite, "That man has no learning, no sense, no manners, and more impudence than tencarted street walkers." It was as an "Old Bailey" practitioner he acquired that ready command of vituperative language that made him the greatest bully that ever appeared in a Court. Macaulay draws the following graphic sketch of him, "To enter his Court was to enter the den of a wild beast, which none could tame, and which was as likely to be roused by caresses

as by attacks. He frequently poured forth on plaintiffs and defendants, barristers and attorneys, witnesses and jurymen, torrents of frantic abuse, intermixed with oaths and curses. His looks and tones had inspired terror when he was merely a young advocate struggling for practice. Now that he was at the head of the most formidable tribunal in the realm, there were few indeed who did not tremble before him." After the "Bloody Assizes" the hatred he inspired was indescribable. He died a prisoner in the Tower in the forty-first year of his age. He was Lord Chief Justice of England at thirty-five, and Lord Chancellor at thirty-seven. Macaulay further in referring to his rapid elevation and terrible fall, says: "The fall of this man, once so great and so much dreaded, the horror with which he was regarded by all the respectable members of his own party, the manner in which the least respectable members of that party renounced fellowship with him in distress, and threw on him the whole blame of crimes which they had encouraged him to commit, ought to have been a lesson to those intemperate friends of liberty who were clamoring for a new proscription."

Chief Justice Sir Robert Wright was a no less disgraceful appointment than that of Jeffreys. He was placed in this position to do work no self-respecting Judge would do, his chief recommendation being his unscrupulous servility. Ignorant, overbearing and resting under the imputation of having made a false affidavit to obtain a large sum of money, yet this abandoned man presided on the hearing of one of the most notable cases ever heard in a British Court of Justice, the trial of the Seven Bishops, in which were engaged some of the ablest and most learned members of the profession, who were compelled to submit to the dictation and ruling of this abject man.

A brief summary of some of the excellent reforms wrought and notable judgments delivered, in the course of the remarkable career of Chief Justice Holt, may prove not uninteresting.

The great case of *Coggs v. Bernard*, 2 Lord Raymond, p. 909, (1703), is noted for containing, in the judgment delivered by Lord Chief Justice Holt, the fullest and most masterly exposition on the subject of bailments extant. Sir William Jones, in his excellent essay on this branch of the law, in referring to it, remarks: "The Chief Justice pronounced a clear, methodical, elaborate argument; in which

he distinguished bailments into six sorts, and gave a history of the principal authorities concerning each of them, . . . and, if my little work be considered merely as a commentary on it, the student may, perhaps, think, that my time and attention have not been unusefully bestowed."

This case established the important principle, that if a man undertakes to carry goods safely and securely, he is responsible for any damage they may sustain in the carriage through his neglect, though he was not a common carrier and was to have nothing for the carriage.

And thus over two hundred years ago was settled the point of law, which remains unquestioned even to this day: That the breach of a trust undertaken voluntarily is a good ground for an action. On the trial of the cause, at Guildhall, before the Lord Chief Justice, it was strongly urged by way of defence, that there was no consideration to ground the promise upon, "to safely and securely deliver," and, therefore, the undertaking was *nudum pratum*. To this objection the Chief Justice replied: "A bare being trusted with another man's goods, must be taken to be sufficient consideration if the bailee once enter upon the trust, and take the goods into his possession." On motion before the full Court in arrest of judgment, the verdict for plaintiff was unanimously sustained. In concluding his able judgment, the Chief Justice is thus reported: "I have said thus much in this case, because it is of great consequence, that the law should be settled in this point, but I don't know whether I may have settled it, or may not rather have unsettled it. But however that happen, I have stirred these points, which wiser heads in time may settle." The decision may be thus briefly summarized: Case lies for negligently executing a gratis commission.

It was on the hearing before the full Court, in this celebrated case, Mr. Justice Powell gave expression to the judicial dictum, now grown into a maxim: "For nothing is law that is not reason."

A no less notable case was that of *Ashby v. White*, 2 Lord Raymond, page 938 (1703), in which Lord Chief Justice Holt laid down, for the first time, the important doctrine that an action on the case lies for the infringement of a right, although no actual damage can be proved. The question was whether an action would lie against the returning officer by a voter, who had a right to vote in the election

of a member to Parliament and whose vote was wrongfully rejected at the poll, although the candidate for whom he intended to vote was elected. After verdict for plaintiff, it was moved in arrest of judgment that the action was not maintainable. It being a case of first impression, it is exceedingly interesting to read the divergent opinions of the Judges. Three of them held the action would not lie, each assigning a different reason, Holt alone holding the contrary. The masterly and exhaustive judgment of the Chief Justice is well worthy of careful perusal. This judgment was, however, reversed in the House of Lords, and judgment given for plaintiff by fifty lords against sixteen.

This case consequently established the distinction between *injuria sine damno* and *damnum sine injuria*, that is to say: "When a person has sustained what is called in law an injury, or an invasion of a legal right, he may bring action without proof of special damage, for the injury itself is held to imply damage. It was strongly urged by counsel in defence, that, even if Ashby had sustained some damage, it was of such inconsiderable a character as to be unworthy of notice and not admissible according to the well-known maxim, *de minimis non curat lex*. To which the Chief Justice replied: "The right a man has to cast his vote at the election of a person to represent him in Parliament, there to concur in the making of laws, which are to bind his liberty and property, is a most transcendent thing, and of a high nature, and the law takes notice of it as such in divers statutes." It was further urged by way of defence, that there was no precedent for such an action and that it would occasion multiplicity of suits, if the verdict should be sustained. To which Lord Chief Justice Holt gave the unanswerable reply: "That if men will multiply injuries, actions must multiply too." He further said: "That it would look strange, when the Commons of England are so fond of their right of sending representatives to Parliament, that it should be in the power of a sheriff to deprive them of that right." The reputation already acquired by the Chief Justice was greatly enhanced by the decision in these important cases.

Lord Holt, too, did much to shape and mould the law to meet the requirements of the altered circumstances arising from commercial expansion at home as well as in the development of trade with foreign countries. Bills of exchange had been for many years in use in Amsterdam and

Hamburg, before being brought into use in England. As far back as the reign of Richard II., however, they were used in England as a means of conveying money out of the realm. Subsequently their use was extended in dealings between English and foreign merchants; afterwards the domestic bills between traders, and finally to all persons whether traders or not. The rights, liabilities and remedies of parties on these instruments were regulated by the *lex mercatoria*, or custom of merchants. By an Act passed in the reign of William III., the remedies and liabilities of parties to bills of exchange were settled with a fair degree of certainty. Not so, however, with respect to promissory notes, which owing to increase of domestic trade had come into general use. They were not transferable, as in the case of bills of exchange, either by the custom of merchants, or at common law, for being choses in action (or debts), livery of seisin could not be given of them as of land. To obviate this defect, Holt framed an Act and caused it to be carried through Parliament, entitled an Act for giving the like remedy upon promissory notes as in use upon bills of exchange and for better payment of inland bills of exchange. This Act, 3 & 4 Anne, ch. 9, enacted in 1705, sets forth by way of recital, that notes in writing are not assignable or indorsable over, within the custom of merchants, to any other person; therefore, to the intent to encourage trade and commerce, which would be much advanced if such notes should have the same effect as inland bills of exchange, it was enacted that promissory notes might be assigned and indorsed and actions maintained thereon as on inland bills of exchange.

Lord Holt, likewise, succeeded in effecting some excellent reforms in the trial of criminal cases. He put an end to the practice of allowing evidence to be given against a prisoner of former delicts. In a cause tried before him, of a serious criminal nature, the prosecuting counsel offered evidence to prove some felonious act of the prisoner committed some three years before. "What is this you propose to do?" asked the Chief Justice in unmistakable tones. "Are you going to arraign his whole life? How can he defend himself from charges of which he has no notice? How many issues do you propose to raise to perplex both me and the jury? Away! Away! This ought not to be; that has nothing to do with this matter."

A practice had obtained up to this time of trying prisoners in fetters. A prisoner having been brought into Court manacled, he said with great vehemence: "I should like to know why the prisoner is brought here ironed? If fetters were for his safe custody before, there is no danger of escape and rescue here. Let them be instantly knocked off. When prisoners are tried they should stand at their ease."

The great Chief Justice, also entered his emphatic protest against the laws relating to forestalling and regrating, offences both at common law as well as by statute 5 & 6 Edward VI. Yet strange to say, those absurd laws continued in force until abolished by 7 & 8 Vict. ch. 24.

Not the least of Lord Holt's achievements was the putting an end to trials for witchcraft. Eleven unfortunate creatures were tried before him, at different times, for this alleged offence and owing largely to his keen insight and tactical skill the imposture was detected in each case and every one acquitted. Under his advice and direction one of the prosecutors, who claimed he had been one of the victims of witchcraft, was indicted as a cheat and imposter. By the evidence of a skilful witness it was clearly shewn by what process of jugglery the cheat had imposed upon the credulity of simple-minded persons as well as those who should have known better. Through the masterful charge of the Chief Justice, fortified by strong circumstantial testimony, the jury had no difficulty in bringing in a verdict of "guilty" against the charlatan. The Judge ordered him to stand in the pillory, an object of contempt and derision. After this, it was said; "No female was ever hanged or burned in England for being old, wrinkled and paralytic." The last capital conviction in England for the crime of witchcraft occurred in the early part of the reign of Charles II., in 1665, before Sir Matthew Hale, who was a firm believer in this superstitious fraud. Indictments were preferred against two wrinkled old women for laying spells upon certain children. Sir Matthew Hale, in his charge to the jury, said: "You have two things to inquire into; first, whether or no these children were bewitched; secondly, whether the prisoners at the bar were guilty of it. That there are such creatures as witches I make no doubt at all; for first, Scripture affirms so much; secondly, the wisdom of all nations hath provided laws against such persons, which

is an argument of such a crime; and such hath been the judgment of this kingdom, as appears by that Act of Parliament which hath provided punishments proportionable to the quality of the offence." The statute referred to was that of Henry VIII., by which witchcraft was made a felony, without benefit of clergy, punishable with death. They were found guilty, and the Judge, after expatiating upon the enormity of their offence and declaring his entire satisfaction with the verdict, admonished them to repent and then sentenced them to death. Lord Campbell, in commenting upon these judicial murders, remarks: "How much more should we honor the memory of Hale, if retaining all his ardent piety, he had anticipated the discovery of Lord Chief Justice Holt, who put an end to witchcraft by directing a prosecution against one who pretended to be bewitched and indicted him as a cheat and imposter."

The statute against witchcraft was not repealed till 9 George II. ch. 5.

Holt was the first to lay down the law, that the status of slavery could not exist in England. The question arose in the case of *Smith v. Brown*. A slave had been sold in Virginia, where slavery was allowed by law; in an action brought in the Court of King's Bench, for the price, the declaration set forth that the defendant was indebted to the plaintiff, in the city of London, for a negro slave there sold and delivered. After verdict for plaintiff, on motion in arrest of judgment, because the contract in respect of which the supposed action arose was illegal in England, it being alleged in the declaration the slave had been sold in London, Holt, C.J., said: "As soon as a negro comes into England, he is free; one may be a villain in England, but not a slave." It was this decision of Lord Holt that inspired the poet Cowper in penning the following eloquent lines:

Slaves cannot breathe in England; if their lungs
Receive our air, that moment they are free;
They touch our country, and their shackles fall.

Chief Justice Holt died, universally admired and beloved, on the 5th day of March, 1710, in the sixty-eighth year of his age.

Over two centuries have passed since the death of this great jurist, and yet the lustre of his fame for the impartial administration of justice is still undimmed. His fear-

less independence, his unsullied integrity and profound knowledge of law constituted the model on which the high character of English jurisprudence has since been formed.

The following just tribute is from the pen of Lord Campbell: "He was considered a consummate jurist; misled by no predilection; seeing what the law ought to be, as well as what it was supposed to be; giving precedent its just weight, and no more; able to adapt established principles to the new exigencies of social life; and making us prefer Judge-made law to the crude enactments of the Legislature."

St. John, N.B.

SILAS ALWARD.

SUPREME COURT REPORTS.

IN RE BRITISH COLUMBIA FISHERIES.

In respect of waters within the "Railway Belt" of British Columbia which are tidal, it is not competent to the Legislature of British Columbia to authorize the Government of the province to grant by way of lease, license or otherwise the exclusive right of taking fish which, as *ferae naturae*, are the property of nobody until caught. The public right to take such fish being subject to the exclusive control of the Dominion Parliament, it is immaterial whether the beds of tidal waters passed or did not pass to the Dominion in virtue of the transfer of the "Railway Belt."

As to waters within the "Railway Belt" which although non-tidal are in fact navigable, the Legislature of British Columbia is likewise incompetent to make such grants.

It is not competent to the Legislature of British Columbia to authorize the Government of the province to grant, in the open sea within a marine league of the coast of that province, by way of lease, license or otherwise, the exclusive right of taking such fish (*ferae naturae*).

In so far as concerns the authority of the Legislature of British Columbia to authorize the Government of the pro-

vince to grant by way of lease, license or otherwise the exclusive right to take such fish (*ferae naturae*), in tidal waters, there is no difference between the open sea within a marine league of the coast of the province and the gulfs, bays, channels, arms of the sea, and estuaries of the rivers within the province or lying between the province and the United States of America.

Per FITZPATRICK, C.J., and DAVIES, IDINGTON, DUFF and BRODEUR, JJ., (ANGLIN, J. expressing no opinion on the point):—The beneficial ownership of the beds of navigable non-tidal waters within the "Railway Belt" in British Columbia, which were vested in the Crown in the right of that province, at the time of the transfer of the "Railway Belt lands" to the Dominion of Canada, passed to the Dominion in virtue of the transfer.

Hon. A. W. Atwater, K.C., and *Newcombe*, K.C. (Deputy Minister of Justice), for the Attorney-General of Canada.

Lafleur, K.C., and *H. A. Maclean*, K.C., for the Attorney-General of British Columbia.

Wallace Nesbitt, K.C., *Aimé Geoffrion*, K.C., *E. Bayly*, K.C., and *Chris. C. Robinson*, for the Attorneys-General of Ontario, New Brunswick and Manitoba.

S. B. Woods, K.C., for the Attorneys-General of Saskatchewan and Alberta.

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THE FIRST YEARS OF THE QUARTER SESSIONS IN AND FOR THE NEWCASTLE DISTRICT.

By The Honourable William Renwick Riddell, LL.D., &c., Justice,
Supreme Court of Ontario (Appellate Division).

Sir Guy Carleton, Lord Dorchester, Governor-General of Canada, by Royal Proclamation dated July 24th, 1788, divided the territory afterwards to become Upper Canada, into four districts, called respectively (beginning with the East), Lunenburg, Mecklenburg, Nassau and Hesse. Upper Canada was established as a separate Province by the Act 31 George III., ch. 31, which by the proclamation, November 18th, 1791, of Alured Clarke, Lieutenant-Governor of Quebec, acting in the absence of the Governor, became effective December 26th, 1791. General Simcoe, Lieutenant-Governor of the new Province of Upper Canada, by Royal Proclamation, dated at Kingston, July 16th, 1792, divided the province into counties. Amongst them were Northumberland and Durham.

Northumberland was "bounded on the east by the westernmost line of the county of Hastings (i.e., 'the easternmost line of the River Trent . . . along the said river until it intersects the rear of the ninth concession, thence by a line running north sixteen degrees west until it intersects the Ottawa or Grand River') and the carrying place of the Presque isle d'Quinte, on the south by Lake Ontario until it meets the westernmost point of the Little bay, thence by a line running north sixteen degrees west until it meets the southern boundary of a tract of land belonging to the Mississague Indians, thence along the said tract parallel to Lake Ontario until it meets the northwestern boundary of the county of Hastings." It also included

Islands in the lake and the Bay of Quinte nearest to and fronting the county.

Durham was bounded on the east by the western boundary of Northumberland, "on the south by Lake Ontario until it meets the westernmost point of Long Beach, thence by a line running north sixteen degrees west until it intersects the southern boundary of a tract of land belonging to the Mississague Indians, thence along the said tract parallel to Lake Ontario until it meets the northwesternmost boundary of the county of Northumberland."

The four districts formed in 1788 were not interfered with; but the new counties were grouped into constituencies for the election of members of the House of Assembly. In all, there were nineteen counties; and sixteen representatives were to be elected.

At the first session of the first Parliament of Upper Canada, by Statute 32 George III., ch. 8 (1792), the names gives by Dorchester to the several districts were changed to Eastern, Midland, Home and Western, respectively.

What subsequently became Newcastle District was part of Nassau (Home) District, which extended from the north to the south of the old Province of Quebec, being bounded on the east by "a north and south line intersecting the mouth of a river now called the Trent, discharging itself from the west into the head of the Bay of Quinty" (in the French version "*la baie de Quinte*") and on the west by "a north and south line intersecting the extreme projection of Long Point into the lake Erie on the northerly side of the said lake Erie." The "north and south" lines were afterwards run on a course north sixteen degrees west, at right angles to the general course of the lakes; and the very great size of Nassau district was due to the almost total absence of population at the time, except near the Niagara frontier.

The same statute which changed the names of the Districts authorized the Justices of the Peace at the General Quarter Sessions to procure plans for a gaol and Court House and tenders for the erection of the same; and they were authorized and required to let the contract to the lowest bidder, proper security being given for the due performance of the contract. It was to be an article in the contract that the gaol and Court House should be completed within eighteen months after the execution of the contract. This statute by sec. 12 directed that the gaol and Court House for the

Home District should be built at Newark (Niagara-on-the-Lake); and this was done.

But immigration began to be of importance in the Bay of Quinte and Lake regions; and it was obviously inconvenient that a journey of nearly 200 miles should need to be taken to attend a Court of Assize, etc. Accordingly, in 1798, by the Act 38 George III. ch. 5 (to which the Royal Assent was given January 1, 1800), the enormous Home District was divided; the new Home District to consist only of the counties of Northumberland, Durham, York and Simcoe. This Act limited the county of Northumberland to the townships of Murray, Cramahe, Haldimand, Hamilton, Eln-
wick (Alnwick), Percy and Seymour, with the peninsula of Newcastle; and limited Durham to "the townships of Hope, Clark, and Darlington, with all the tract of land, hereafter to be laid out into townships, which lies to the southward of the small lakes above Rice Lake and the communication between them and between the eastern boundary of the township of Hope and the western boundary of the township of Darlington produced, north sixteen degrees west until they intersect either of the said lakes or the communication between them." It will be seen that Northumberland has not since been diminished, but Durham has been. "The Peninsula of Newcastle" is Presqu' Isle, which had been surveyed in 1797, and in great part reserved for military purposes. A town plot had been laid out with lots reserved for church, school, hospital, parsonage and burying ground.

By the Act of 1798, ch. 5, sec. 25, it was provided that as soon as the counties of Northumberland and Durham should make it appear that there were one thousand persons within the two counties, and that six of the townships held town meetings according to law, these two counties, with all the land in their rear confined within their extreme boundaries produced north sixteen degrees west until they intersect the northern limits of the province, should become a separate district, to be called the Newcastle District.

The required population was not long delayed. The Lieutenant-Governor, Peter Hunter, issued his proclamation June 23rd, 1802, declaring the two counties and the land to their rear, the District of Newcastle. The same day he sent a message to the Legislative Council and the Assembly, asking them to make provision for the District. In the Upper House the message was directed to be laid on the table; but

in the Commons House of Assembly, "Mr. Rogers moved, seconded by Mr. McCrae, that Mr. Thompson and Mr. Macdonell, of York, be a committee for the purpose." An amendment adding Mr. Rogers himself to the committee was lost and the original motion was passed. "Mr. Rogers" was David McGregor Rogers, member for Hastings, Northumberland and Durham; Mr. Thompson was member for Lennox and Addington, and Mr. McCrae for Kent. The committee ordered to draft a bill, reported June 26th, 1802, on which day it was read the first time.

The Act as proposed directed that Courts should be held in and for the new District; the Assize Courts to begin in 1803. Section 2 of the Act directed a gaol and Court House for the district, to be erected and built in some fit and convenient place within the town of Newcastle (Presqu' Isle); and sec. 3 that until this should be done the Quarter Sessions should "appoint some place therein for the holding of the Courts of General and of Quarter Sessions of the Peace and of all the other Courts held at a place certain.
. . . ."

On the second reading, June 29th, Mr. Rogers moved, seconded by Mr. Sherwood, member for Grenville, that "the words which direct that the gaol and Court House shall be built at Newcastle" be expunged; but this motion was lost. The Bill was passed in the Assembly June 29th, and in the Council July 1st, and approved July 7th. Whether the fact that Mr. Thompson had a grant of a lot on the peninsula had anything to do with the selection of the embryo town of Newcastle as the site of the Court House, of course, we cannot say. It is to be observed that Mr. Rogers, who opposed the proposition, was in the same position; and it is more than probable that the Government of the day desired a settlement near what was undoubtedly a very valuable harbour.

The opposition of Rogers, it seems likely, operated elsewhere, and in an efficient manner, to checkmate the scheme.

The Justices of the Peace did not delay in meeting. From the official records, which are still extant, it appears that Alexander Chisholm and Isaiah Hall, J.P.'s, met in General Quarter Sessions of the Peace at Murray, October 12th, 1802. A grand jury was sworn, of men whose names are familiar in the counties to this day. A defendant is tried for assault, found guilty by the petit jury, and fined seven dollars.

The next meeting is also at Murray; January 11, 1803; at which John Bleeker, J.P., appears with the two already named. Two persons are bound over to appear at the Assizes and General Gaol Delivery. The next is at the same place, April 12, 1803, when six magistrates attend; Messrs. Chisholm and Bleeker, and Timothy Thompson, Benjamin Richardson, Elias Jones, and Joseph Keeler. Richardson, Jones and Keeler were new appointments. All three had been grand jurors at the first meeting. At this meeting it was ordered that the next General Quarter Sessions should be held at the house of Mr. Leonard Soaper, in Hope; and it was so held, July 12, 1803. Robert Baldwin, Timothy Thompson, Elias Jones, Leonard Soaper, Asa Burnham, Benjamin Marsh and Richard Lovekin were the magistrates.

Robert Baldwin was the father of Doctor William Warren Baldwin, and grandfather of the Honourable Robert Baldwin. He came out from Ireland, Cork County, in 1798, and settled in Clarke township, on "Baldwin's creek," now Wilmot's creek. Timothy Thompson we have met before. The others all bear names well-known locally. Burnham had been a grand juror at the first meeting. A man is convicted of an assault, and fined two shillings and sixpence.

The next meeting is at Murray, October 11, 1803, when Messrs. Thompson, Chisholm, Keeler, Soaper, Bleeker, Burnham and Marsh again attend; and Asa Willer is added. He had been a grand juror in January, 1803, and was consequently a new appointment.

At this meeting Daniel Adams, Deputy Collector of the Port of Newcastle, gave information that he had, August 12, at the river Trent, in the township of Murray, seized a four-handed batteau and six barrels of salt, said to be the property of Bass Chard, on suspicion that it had come from the United States and had not been entered at any customs house. Bass Chard appeared, being duly summoned, "to make his defence against the said charge . . . and having heard the same . . . he . . . hath nothing to say nor can say anything in his own defence . . . but doth of his own accord freely and voluntarily acknowledge and confess . . . to be true. . . ." He is accordingly convicted and the batteau and salt ordered to be sold. Salt was a commodity of value and subject to duty. Much smuggling took place of salt, as well as of tobacco, tea, etc. A

custom house was placed at Newcastle (Presqu' Isle), the only one between Kingston and York (Toronto).

The next session was at Haldimand, January 10, 1804. No new names are found. Some persons charged with riot, etc., are arraigned; and one charged with robbery; they are bound over to the next Court.

An annual return of the inhabitants of the district for the year 1803 will prove interesting:—

TOWNSHIP.	Men.	Women.	CHILDREN.				Total.
			Male.		Female.		
			Above 16.	Under 16.	Over 16.	Under 16.	
Murray.....	34	21	2	25	1	20	103
Cramahé.....	66	60	.....	98	.....	90	314
Haldimand.....	91	69	.....	71	.....	81	312
Hope.....	68	47	.....	80	.....	82	277
Percey.....	22	22	9	45	2	27	127
Clarke.....	16	6	.....	6	.....	11	39
Darlington.....	25	15	.....	27	.....	21	88
Totals.....	322	240	11	352	3	332	1,260

In the district there are 63,661½ acres of uncultivated and 3,748½ of cultivated land; the former worth £3,183, and the latter £3,740. One house in town and twenty-one in the county (with two fire-places) worth £40 each; one merchant's shop and two taverns.

The next meeting was at Haldimand, April 10, 1804, at which attended Thompson, Richardson, Burnham, Keeler, Soper, Weller (now having his right name and no longer called Willer) Jones and Lovekin. Joel Merriman and John Spencer appear for the first time. The former had been a grand jury man at the first meeting, and both at that of October 11, 1803. One defendant is acquitted of assault and battery and others have their case postponed. It was ordered that the next meeting should be held at Hope, the October sessions at the house of Mr. William Lounsbury in Murray, and January and April sessions at the house of Mr. Luther Hull in Haldimand. Provision is made for paying Mr. Rogers' wages as Member of Parliament for 1801,

1802, 1803 and 1804, and also to pay him for services as Clerk of the Peace.

The next meeting was held at Hope, July 10, 1804, Messrs. Thompson, Chisholm, Baldwin, Soper, Lovekin, Keeler, Marsh, Jones and Burnham are joined by Elias Smith. Some rioters are tried and convicted of assault and battery, and some persons charged with offences are bound over.

No new names appear at the next meeting in Murray, October 9, 1804. One man accused of assault is found guilty by the jury and fined five shillings.

At the next meeting, January 8, 1805, there are no new justices of the peace. One woman pleads guilty to a charge, and is fined five shillings and the costs of the prosecution. Other alleged offenders are bound over to the assizes.

At Haldimand, April 9, 1805, met Messrs. Chisholm, Baldwin, Lovekin, Smith, Weller, Jones, Marsh, Spencer, Richardson, Soper, Keeler, Burnham and Merriman—a Bench of thirteen as compared with five at the last two meetings. Whether this large attendance was due to the provisions of the statute passed a month before it is not possible to say but the chances are that such was the case.

We have seen that the Act of 1802 directed a gaol and Court House to be erected and built within the town of Newcastle; but the section (2) goes on to say that it shall be “in such manner and under the same rules, regulations . . . as in that respect are made and provided” in the Act of 1792. A reference to that Act will shew that while the magistrates are given the power to call for plans, etc., it is not made in so many words obligatory for them to do so. They must give the tender to the lowest bidder, but there is nothing to compel them to receive any bids.

Accordingly, the magistrates simply did not call for tenders or bids for gaol and Court House at Presq’Isle, and the temporary buildings erected there by the Government were made to do duty. It is more than likely that this neglect was due, to some extent at least, to the opposition of Mr. Rogers, M.H.A., and clerk of the peace, Registrar, Judge of the District Court, etc., etc., a man of great energy and wide influence. He, as we have seen, opposed the clause in the Act of 1802, making Newcastle the place for Court House, etc. But a temporary gaol and Court House were in

fact built by the Government at the "town of Newcastle" not at the expense of the district.

It was when conveying passengers to this place in 1804 that the Government schooner "Speedy," Captain Paxton, was lost with all on board. An Indian, Ogetonicut—a Chippewa—had murdered John Sharpe, a white man, at Lake Scugog; it is said in revenge for the murder of his brother Whistling Duck, by a white man. The Indian murderer was arrested near York and lodged in gaol there, but the murder had been committed in the Newcastle district and the Indian must stand his trial in that district. Accordingly the Schooner "Speedy" one of the Provincial Navy, was sent on that errand. She carried the Judge, Mr. Justice Cochrane; the Solicitor-General, R. I. D. Gray, who was to prosecute the prisoner, Angus Macdonell, the Sheriff, the prisoner, witnesses, interpreters, constable, and some others. A storm sprang up; the vessel was unseaworthy and, after being sighted opposite Keeler's creek (Colborne harbor), she was not seen again, but was lost with all on board—Captain, crew of five, and passengers about twenty in number—October 7, 1804.

It may be that this fatality had something to do with the Act passed the following year, 1805, 45 Geo. III. ch. 5, which authorized the Magistrates in the first Quarter Sessions to be held after the passing of the Act "to appoint some fit and proper place in either of the townships of Haldimand or Hamilton . . . where a gaol and Court House may be built in the same manner as a gaol and Court House is to be built . . . in the town of Newcastle," and that the gaol and Court House should be built within two years or the Act become void.

It has been claimed that the loss of the "Speedy" had been made a pretext for changing the place for the Court House. But nothing of the kind appears in the proceedings of the Parliament, although two members of the House of Assembly had been drowned, Gray and Macdonell. On Tuesday, February 5, 1805, a petition from the district of Newcastle was presented setting out that the place appointed for the Court House, etc., at the town of Newcastle was inconvenient, and asking that some place nearer the centre of the district might be selected instead. The petition was signed by Robert Baldwin, John Spenser, Leonard Soper, Joseph Keeler, Elias Jones, Elias Smith, Sr., Benjamin

Marsh, Asa Burnham; Joel Merriman, John Peters (Sheriff), Timothy Porter (Coroner), R. McG. Rogers, Clerk of the Peace, and 123 others. An Act was introduced the same day and received its first reading. The House divided on the third reading (February 12, 1805), Messrs. Clench of Lincoln, and Washburn of Prince Edward, opposing and twelve (including Rogers) in favour of the change. The Legislative Council passed the bill, with amendments in which the Assembly concurred, February 18; and the Royal Assent was given March 2nd. The sessions of April 9th. was the first thereafter.

The magistrates made an order "that the gaol and Court House be built on lot number 19 in the first concession of Hamilton, Asa Burnham, Esquire, having promised and agreed voluntarily to give four acres on the said lot for to build a gaol and Court House on."

At the same meeting Reuben Crandel, of Cramahe, received a license to celebrate matrimony. He was "a minister of the Religious Congregation of Calvinists;" and called as witnesses John Spenser, Esquire, Moses Hinman, Joseph Phillips, Joseph I. Losie, Benjamin Ewing, Moses Doolittle and John Phinn, all of Haldimand, members of his congregation. This license was made necessary by the Act of 1798, 38 Geo. III. ch. 4.

George Davis, of Hope, is paid one pound for killing a wolf. A certificate had been given him by W. Baldwin, Esquire, but he had lost it.

His wages as member of the House of Assembly were ordered to be paid to David M. Rogers, as also his bill as Clerk of the Peace and the bill of John Peters, Sheriff.

The next meeting was held at the house of Zacheus Burnham, in the township of Hamilton, July 9, 1805. No new names appear on the Commission. Four ladies bar their dower in land sold by their husbands under the Act of 1797, 37 Geo. III. ch. 7, Susanah Conat to part of lots 29 and 30, 1st concession and broken front, Darlington, 229 acres; Hannah Haulenbeck, lot 7, concession 3 Hamilton; Margaret Jones, part of lot 20 in front of the first concession Hamilton, sold to John Nugen; and Rebecca Mallery lot 6 "second concession of the broken front of the township of Hamilton, sold by her husband Simmon Mallery to John Mallery."

At the following sessions, holden at Murray, October 8, 1805,, we see no new faces on the Bench.

Paul Terry is indicted for a nuisance and found guilty, being fined 2 shillings and six pence. A bench warrant issued against James Hendricks, of Murray, indicted for neglect of duty as path master (he was convicted at the next Court and fined five shillings). A presentment against three magistrates, all three then sitting on the Bench, for neglect of duty as commissioners of highways, is directed to be sent to the Attorney-General. A juryman who fails to attend is fined twenty shillings currency (\$4.00). And the next meeting is directed to be held at the house of Mr. Luther Hull now kept by Mr. Joel Parker in the township of Haldimand. Polly Woodworth, wife of Ezra Woodworth of Percy, barred her dower in the north part of lot 14 concession 4 of Percy, 100 acres; Mary Woodworth, wife of Ezra Woodworth, of Percy, in the southern part of the same lot 100 acres; and Elizabeth Frederick, wife of Conrad Frederick, Ameliasburg township, in "the west half of a lot in Thurlow."

I do not pursue the investigation into the particular acts of the Quarter Sessions. From and after April 14th, 1807, the place of meeting is the Court House in the township of Hamilton, around which a considerable village grew, at first called Amherst, and later when it became a part of the town of Cobourg, and down to the present time, "the Court House." Fifty years ago it had hotels, stores, etc., and was a flourishing hamlet; but is now purely residential.

July 14, 1807, the Sheriff, John Peters, reports having examined the gaol and that he does not think it sufficient to contain any prisoners whatsoever. The first gaolers' fees are ordered to be paid April 12th, 1808.

It will be seen that the Quarter Sessions in those days had a good deal to do. They tried with a jury, assaults and trespasses, neglect of duty, and other minor offences; bound over those charged with more serious crimes to be tried before a higher Court; made provision for payment of Members of Parliament, sheriffs, clerks of the peace, etc. They also fixed districts for the Courts of Request, and assigned Justices of the Peace to preside in these Courts for small claims; they appointed constables, licensed Ministers to perform the marriage ceremony, laid out sums on roads, and many other duties fell to their lot. Their labours were of advantage to Canada, and they should receive their due meed of recognition and praise.

THE JUDICIAL COMMITTEE.

REX V. THE GRAND TRUNK PACIFIC RAILWAY COMPANY.¹

A question between the Government and the company involving an amount greater than \$13,000,000 depended upon the construction of a clause of an agreement between the parties. The Supreme Court of Canada decided unanimously in favour of the Government. The Judicial Committee reversed the decision. I now submit the point to the profession, believing that if there can be any difference of opinion as to the true construction of the agreement, there can be none as to the validity of the only reasons assigned by their Lordships in support of their view. Observing that the documents to be quoted dealt with the western division of the railway only, let us look at the relevant clauses of the documents:—Section 28 of the first agreement (29 July, 1903), is as follows:—

“For the purpose of aiding the company in the construction of the western division, the Government shall guarantee payment of the principal and interest of an issue of bonds to be made by the company *for a principal amount equal to seventy-five per centum of the cost of construction of the said division*, as defined and ascertained in accordance with the provisions of paragraph eighteen hereof. . . .

Other clauses of the agreement may be summarized as follows:—

34. The Grand Trunk Railway Co. was to “guarantee bonds of the company *for the balance required for the construction of the said western section.*”

35. The company was to create a first mortgage to secure payment of the bonds guaranteed by the Government, and a second mortgage to secure payment of the bonds guaranteed by the Grand Trunk.

Owing to depression in the money market, the company soon discovered that the proceeds of an issue of guaranteed bonds to the face value of the amount of “75% of the cost of construction” would not equal 75% of that cost—the bonds would not sell at par. In view of this fact a further agreement (18 February, 1904), provided (*inter alia*) as follows:—

¹ Hereinafter called the company.

"Notwithstanding anything in the said contract contained, the Government may and shall . . . implement for the purposes and subject otherwise to the provisions of the said contract, its guarantee of the bonds of the said company to be issued for the cost of construction of the said western division, in such manner as may be agreed upon, so as to make the proceeds of the said bonds so to be guaranteed a sum equal to seventy-five per centum of the cost of construction of the western division ascertained as provided in the said contract. . . ."

It was the construction of this clause that was disputed by the parties: The company claimed that the Government had agreed to hand over *in cash* or its equivalent, the difference between the sum realized by an issue of bonds to the face amount of 75% of the cost of construction, and 75% of the true amount of such cost—that is, that the Government would pay in cash the discount on the issue of the bonds. And the Government contended that its agreement was to "implement . . . its guarantee of bonds . . . so as to make the proceeds of the said bonds" equal to 75% of the cost—that is, that the Government was not to pay cash but to guarantee more bonds.

The company had a difficult case. The original agreement provided for governmental assistance by a guarantee of bonds to an amount which afterwards appeared to be inadequate; the second agreement provided for implementing the guarantee so as to produce an adequate sum, and the company contended that that meant a subsidy—in cash or its equivalent. The transition from guarantee to subsidy appears, at first sight, to be almost impossible, and the Supreme Court said as follows:—

"We had no hesitation in reaching the conclusion that the extended liability the Government agreed to assume by the agreement of 1904 was a secondary liability only and not a primary one. The result of such holding was of course that the only liability of the government was to guarantee bonds of the company the proceeds of which would produce a defined amount."

The language of the agreement appearing to indicate not subsidy but further guarantee, it may be thought probable that the Judicial Committee would have so held but for two curious misapprehensions into which their Lordships

appear to have fallen. It is to these alone that I confine my criticism. Their Lordships said:—

“With the utmost deference their Lordships are unable to accept the interpretation placed by the Supreme Court on paragraph 5. . . . It would be a breach of faith with the Grand Trunk Railway Company to let in any further charge in priority to their security; and, as it appears to their Lordships, the company has no power to issue bonds other than those authorized by the original contract.”

First as to the breach of faith with the Grand Trunk Railway Company: Under the first agreement, the Government was to guarantee a certain fixed amount of bonds, and the Grand Trunk Railway Company was to guarantee a second issue of bonds “for the balance required for the construction of said western division.” A change, in this arrangement, therefore, by which the first issue was increased, would be beneficial and not injurious to the Grand Trunk Railway Company, for (1) the amount of the second issue (which it was to guarantee) would thereby be reduced; and (2) the company for which it was becoming guarantor would be saved the difference between the selling price of bonds guaranteed by the Government on the one hand, and by the Grand Trunk Railway Company on the other. In other words, increasing the amount of the first issue of bonds would “let in a further charge in priority to their security,” but it would, at the same time, correspondingly reduce the amount of their liability and risk. Every second mortgagee with unsafe security would be pleased if the first would take over some of his advances—more particularly if the effect would be to improve the financial position of the mortgagor.

That is one answer to the suggestion of a breach of faith with the Grand Trunk Railway Company, but the second answer is, if possible, still more conclusive. It is this, that the same agreement which contained (*inter alia*) the implementing clause, provided also (paragraph 12), that both of the agreements were to be “ratified by a general meeting of the shareholders of the Grand Trunk Railway Company,” and that they were so ratified. The implementing provision, therefore, whatever its true construction, could not be a breach of faith with the Grand Trunk Railway Company, for that company agreed to it—almost certainly, very gladly agreed to it.

The second reason given by their Lordships indicates still stronger misapprehension of the whole case. Their Lordships said that "it appears to their Lordships, the company has no power to issue bonds other than those authorized by the original contract."

The authority of the company to issue bonds is not in the original contract at all. It is in the company's charter. The contract presupposes authority to issue bonds and provides for the guarantee of some of them by the Government and of others by the Grand Trunk Railway Company.

That is one answer. A second is this, that nobody ever suggested that the company should issue "other bonds than those authorized by the original contract." All that was proposed and agreed to was that *of the same aggregate amount* of bonds, the Government should guarantee more, and the Grand Trunk Railway Company less than as originally contemplated.

Respectfully, I submit that the reasons given by their Lordships are based upon very unfortunate misapprehension. And perhaps the presumption would not be unfair that had their Lordships not been influenced by these reasons, the view which regards the statute as a provision for implementing the guarantee and not as providing for a grant of money would have been declared to be the correct construction. Upon that, however, I do not now insist.

When, in 1871, some of the Australian colonies were suggesting the abolition of appeals to London, their Lordships offered, as one of the reasons for the retention of the practice, that: "It removes causes from the influence of local prepossession." Their Lordships did not intend any slur upon the rectitude of colonial Judges. They had in mind the unconscious but powerful influence of personal sympathies upon the mental processes of human beings everywhere. And speaking in the same carefully guarded and perfectly respectful way, I take the liberty of suggesting whether it is not possible that their Lordships may not sometimes be unconsciously inclined to accept arguments which support the interests of British bondholders and shareholders rather than those which appear to militate against them.

JOHN S. EWART.

THE JUDICIAL COMMITTEE.

KELLY v. KELLY.

The managing partner of a firm of contractors, in Manitoba (call him A), drew more money from the firm's account than he was entitled to; used it (without the knowledge of his co-partners) in a variety of speculations for his own benefit—stocks, land-warrants, wheat, real estate, &c. (all outside the scope of the partnership purposes); made profits on some and losses on others of the transactions—what are the rights of the parties?

1. Are the transactions (because the product of partnership moneys) *necessarily* the transactions of the firm? In other words, does the firm take the profit and stand the loss—no matter which it happens to be? Do not say *no* too emphatically.

2. Or are the co-partners (call them M. and N.) merely entitled to a return of the money and, meanwhile, to a lien by way of security upon the properties purchased?

3. Or are M. and N. entitled to adopt the profit transactions, and to leave the losses to A.? This last might be reasonable, but, for the purposes of this article, we may say that it is not the law. The statement would be true of the dealings of A. with the firm's "property, name, or business connections" (for example, the employment of the firm's ships or horses). But it does not apply to money; for that he has not employed, but taken; and it may be charged against him.¹ At all events, whether you agree with this or not, it has nothing to do with *Kelly v. Kelly*. That case involves consideration of the first two questions.

In their statement of claim, M. and N. alleging that A. had, without their consent, used the moneys of the firm "in private speculations and ventures of his own," asserted a right to share in the profits derived from the transactions. In support of that claim, they cited the Manitoba Partnership Act, sec. 24:

¹ Sec. 32 of the Partnership Act provides as follows:—"Each partner must account to the firm for any benefit derived by him without the consent of the other partners from any transaction concerning the partnership, or from any use by him of the partnership property, name or business connections."

"Unless the contrary intention appears, property bought with money belonging to the firm, is deemed to have been bought on account of the firm,"

They contended that "the contrary intention" meant the contrary intention of every member of the firm; and argued that, as they had had no such intention (had not even knowledge of A.'s acts), the statute turned the private speculations into firm transactions. The Judicial Committee agreed with that contention.

A. contended, on the other hand, that the statute had no such curious operation; that "the contrary intention" might appear in a variety of ways; for example, by the fact that the purchases being outside the scope of the partnership, the properties could not possibly "have been bought on account of the firm;" that the effect of the statute was to declare that *prima facie* only—in the absence of contrary intention—property bought with firm money should belong to the firm; and that as, in the case in hand, the fact of private purchase was admitted, the statute did not alter its nature.

But for the decision of the Judicial Committee, I should have said that A.'s construction of the statute was indisputable. And I still think that if A.'s purchases had, in the aggregate, resulted in a huge loss instead of a profit, no one would have argued, and their Lordships would not have held, that M. and N. would have been compelled to share the deficit; nobody would have said that the statute turned A.'s personal speculations, with money wrongfully drawn from the firm, into partnership transactions—that speculations *ultra vires* of the firm were, by the statute, made *intra vires* and conclusive upon the firm.

The absurdity involved in the construction set up by M. and N. is its sufficient condemnation. But add to that, this also: The statute is a codification of the previous law; it is substantially the same as the English Act; the clause in question is identical with the corresponding provision of that Act; prior to the codification, nobody either in England or in Canada had ever suggested that the mere concurrence of the two facts above referred to ((1) employment of firm's money, and (2) no "contrary intention" by every partner) changed a personal into a firm transaction; on the contrary, questions of that nature, arising between partners, were regarded as matters for resolution by evidence. Under those circum-

stances, how is it possible to argue that the statute turns unauthorized and *ultra vires* speculations by one partner into firm transactions?

Reference to two authorities is sufficient. In *Ex p. Neale* 3 De G. F. & J. 645, Knight Bruce, L.J., said:—

“There is no rule that where lands are bought by partners in trade, and are paid for out of partnership assets, they of necessity become part of the joint estate; nor, on the other hand, that if they are not bought for the purposes of the partnership business, they are not joint estate; nor does the form of conveyance settle the question, which must be determined with reference to all the circumstances of the case.”

The learned Judge pointed out, that the lands might have been bought (1) for the purposes of the firm, (2) or for speculation by the firm, or (3) “they may have been bought on account of one or more of the partners, he or they becoming debtors to the partnership for the amount laid out in the purchase.” He examined the evidence and decided according to it.

Lindley, citing as his authority the section above quoted, says:—

“The mere fact that the property in question was purchased by one partner in his own name is immaterial, if it was paid for out of partnership moneys: for in such case he will be deemed to hold the property in trust for the firm, *unless he can shew that he holds it for himself alone.*”

That is precisely the view contended for by A.; and he shewed that he purchased for himself *by quoting the statement of claim which so alleged.*

Let us turn now to the judgments in the *Kelly v. Kelly* case. The Manitoba Court of Appeal decided in favour of A. Mr. Justice Cameron dissented, holding (1) that the moneys used by A. were the moneys of the firm; (2) that M. and N. had not consented; and (3) that the statute applied. After quoting the statute, he said:—

“As is pointed out in Lindley on Partnership, 7th ed., p. 361, although the rules laid down in the Act are of great assistance in determining what is and what is not partnership property, the ultimate test must still be the agreement of the partners. See also Lindley, at p. 367: ‘The only true method of determining as between the partners themselves

what belongs to the firm, and what not, is to ascertain what agreement had been come to upon the subject.' The judgment of Vice-Chancellor Bacon in *Hellmore v. Smith*, 35 Ch. D., p. 441, referred to in the judgment of the learned trial Judge, is instructive. The intention mentioned in the above section of the Act must surely be the intention of all the partners. Even if the intention of the defendant had been to purchase for himself alone, unless the other partners participated or acquiesced in that intention, it could not, in my judgment, affect these transactions or make them anything other than partnership matters."

Upon this I would respectively comment as follows:—(1) The effect is that transactions entered into by A. on his own account; transactions which he could not have entered into on account of the firm; transactions which were outside the scope of the partnership business, are, because of the statute, declared to have been partnership transactions.

(2) Some of the speculations produced profits and some losses—it is said that the statute hands them all over to the firm.

(3) The quotation from Lindley indicates that "the rules laid down in the Act" are intended as "assistance," merely, in determining what is and what is not partnership property. That was A.'s contention, and is contrary to the holding of the learned Judge, in whose view the clause is conclusive.

(4) *Hellmore v. Smith* was a case in which the whole evidence was considered, and not a case in which anybody suggested that the mere ownership of the money and the non-assent of one partner were the sole determining factors.

These points were all elaborated before the Judicial Committee, but in their reasons for judgment, they refrained from all comment or explanation. After quoting the opinions of the majority of the Manitoba Court, they said:—

"Cameron, J., the other member of the Court of Appeal, took a different view. In the result he agreed with the trial Judge, though he did not agree with some of the views expressed by that learned Judge. His judgment as a statement of the relevant facts, and a statement of the law applicable to those facts, leaves nothing to be desired. Their Lordships concur in it entirely."

With reference to that opinion, I venture to submit, for the reasons above given, that the law is not, and cannot be, as their Lordships declare. And I would respectfully add

that, in any case, A. was entitled to some explanation of the ground upon which such a singular result can be maintained.

A corollary of the decision makes more vivid its peculiarity. At one period, some money of the firm had got into the possession of M. and N.; A. required them to hand it over to the firm; they refused, and applied it to a beneficial purchase, for their own benefit, of some real estate. That, too, was *ultra vires* so far as the firm was concerned; was not on account of the firm; could not have been on account of the firm; and was not claimed by A. to have been on account of the firm until the statute was applied against him. Then he presented his claim, and by their Lordships' decision, *it, too, was turned into a firm transaction*. If the purchase had resulted in a loss, the statute would have had, of course, the same application; and A. would have been mulcted in his share of a transaction which he did not enter into, which nobody had authority to put him into, and which he had done what he could to prevent—mulcted, merely because money in which he was interested had been wrongfully applied to a purpose against which he had protested.

That cannot be the construction of the statute. The result is too absurd. As a rule of evidence, the statute is intelligible and reasonable. To convert a declaration as to presumption of fact into an inversion of admitted fact, is to make it absolutely unique in statutory history.

JOHN S. EWART.

LORD SHAW'S JUDGMENT IN DISMISSING PROSECUTION FOR CONTEMPT OF COURT ARISING OUT OF THE PUBLICATION OF PROCEEDINGS.

The question of the right of Judges to try actions in secret was raised in an appeal by Mrs. Annie Maria Scott (nee Morgan) and Mr. Percy Braby, her solicitor, against the judgment of the full Court of Appeal, which dismissed an appeal by the present appellants against a judgment of Mr. Justice Bargrave Deane.

The facts were, shortly, that in a suit by a wife for nullity of marriage it was ordered that the suit should be

heard in camera. The suit was so heard, and a decree of nullity pronounced. Acting on the instructions of the petitioner, her solicitor then caused three transcripts of the shorthand notes taken at the hearing to be made, and sent one copy to the respondent's father, another to his sister, and the third to a person interested in the proceedings. It was alleged by the respondent that the publication of the proceedings in camera was a contempt of Court, and a motion was made on his behalf to commit the petitioner and her solicitor to prison in respect of it.

Mr. Justice Bargrave Deane held that the publication was a contempt of Court, but accepted the apology of the petitioner and her solicitor, and the excuse that they had acted in ignorance, and made no order on the motion, except that they should jointly and severally pay the costs thereof. The petitioner and her solicitor thereupon appealed, and in view of the importance and novelty of the question raised it was decided that the appeal should be re-argued before the full Court, consisting of the Master of the Rolls and five Lords Justices.

On the hearing a preliminary objection was taken on behalf of the respondent upon sec. 47 of the Judicature Act, 1873, which enacts that no appeal shall lie from any judgment of the High Court in any criminal cause or matter save for some error of law apparent on the record, as to which no question shall have been reserved for consideration of the Court of Crown Cases Reserved.

It was contended on behalf of the petitioner that the order was not made in a criminal cause or matter; and alternatively that if it was so made it was erroneous on its face, since the Court had no jurisdiction to prohibit the publication after the proceedings had ended.

The appeal was dismissed by the majority of the Court—the Master of the Rolls and the Lords Justices Farwell, Buckley, and Kennedy—the dissenting members of the Court being Lords Justices Vaughan Williams and Fletcher Moulton (now Lord Moulton.)

From that decision this appeal was brought.

Sir Robert Finlay, K.C., Mr. Barnard, K.C., and Mr. William Willis appeared in support of the appeal; the Solicitor-General (Sir John Simon, K.C.), Mr. Danckwerts, K.C., and Mr. Bayford for the respondent.

During the arguments the Solicitor-General mentioned that he had been instructed to appear by the Treasury. At one time in the proceedings, after the appeal to this House had been set down, there was a doubt whether the husband would appear by counsel, and it was felt that the questions raised were so important, involving as they did questions of practice and procedure, that it was deemed advisable that the law officers should be heard.

The arguments were heard in March last, and reported in *The Times* of March 4, 5, 8, and 11.

At the close of the arguments their Lordships took time for consideration.

The Lord Chancellor, in the course of his judgment (which was read by Lord Atkinson), said that he was of opinion that the judgment of the Court of Appeal should be reversed and the order of Mr. Justice Bargrave Deane discharged, and that respondent should pay the costs here and in the Courts below.

Lord Halebury, Lord Loreburn, Lord Shaw, and Lord Atkinson gave judgment to the same effect.

Lord Shaw (having quoted the terms of the motion by the respondent for the appellant's committal for contempt of Court), continued:—"If this motion be, as was contended, a motion in a criminal cause or matter, it is manifest that it was also much more, for it was not a motion merely for commitment in respect of the alleged contempt, but it was also a motion for an injunction of perpetual silence with regard to what had transpired in the proceedings in camera. In the next place, it was an injunction against molestation; and, lastly, it was a discovery, and a discovery sought from the alleged criminals by their stating on oath the names, addresses, and particulars of their criminal contempt. These, and particularly the last, are singular accompaniments of a step in a criminal cause or matter. The last seems to be an abrogation of the elementary principle that an accused person is not bound to incriminate himself. The majority of the Court of Appeal, holding that the question arose in a criminal cause or matter, have declared a civil appeal to this House is brought.

"After a not inconsiderable study of the authorities and history in relation to this subject, I will venture to enter, notwithstanding the dicta to which I am about to refer, my respectful protest against the assumption of any general

power by the present English Courts of Law to administer this branch of justice and to try suits for declaration of nullity of marriage, or indeed to hold any Courts of Justice, with closed doors. Nor do I confine my rejection of this assumption merely to the existing High Court under the Judicature Act of 1873, nor even to the Matrimonial Court set up by the statute of 1857. For I think it right to make some examination, in the first place, of the power of the old Ecclesiastical Court, as to which I think that much misapprehension has prevailed.

As to the Act of 1857, my Lord, I repeat that I make no excuse for founding upon the terms of these two sections—sections 22 and 46—in combination. For if the view which I have taken be correct—namely, that all was open in the Ecclesiastical Courts except the examination of witnesses, then these two sections put together mean this, that all was to be open in future in the Ecclesiastical Courts, without any such exception whatsoever. When a cause is begun in the Divorce Court a contract of *litis contestation* is entered into in short upon the ordinary terms. The old private examination of witnesses is abolished; the new system is an open system.”

I am of opinion that the order to hear this case in camera was beyond the power of the Judge to pronounce. I am further of opinion that, even on the assumption that such an order had been within his power, it was beyond his power to impose a suppression of all reports of what passed at the trial after the trial had come to an end. But in order to see the true gravity of what has occurred, these two things must be taken together. So taken, my Lords, they appear to me to constitute a violation of that publicity in the administration of justice which is one of the surest guarantees of our liberties and an attack upon the very foundations of public and private security. The Court of Appeal has by its majority declared a review of this judgment by it to be incompetent. I therefore make no apology for treating the situation thus reached as most serious for the citizens of this country.

Consider for a moment the position of the appellants. The case of *Scott v. Scott* was heard in camera. All interruption or impediment either to the elucidation of truth or the dignity or decorum of the proceedings—conceived to be possible by the presence of the public—had been avoided.

The Court had passed judgment in private and the case was at an end. And now judgment has been passed upon the appellants in respect of disclosing what occurred in Court by exhibiting an accurate transcript of what had actually transpired, and the appellants are enjoined to perpetual silence. And against this, which is a declaration that the proceedings in an English Court of Justice shall remain forever shrouded in impenetrable secrecy, there is, it is said, no appeal. I candidly confess, my Lords, that the whole proceedings shock me. I admit the embarrassment produced to the learned Judge of first instance and to the majority of the Court of Appeal by the state of the decisions, but those decisions, in my humble judgment, were rather—for it is in nearly all the instances only so—these expressions of opinion by the way—have signified not alone an encroachment upon and suppression of private right, but the gradual invasion and undermining of constitutional security. This result, which is declared by the Courts below to have been legitimately reached under a free constitution, is exactly the same result which would have been achieved under, and have accorded with, the genius and practice of despotism.

What has happened is a usurpation—usurpation which could not have been allowed even as a prerogative of the Crown, and most certainly must be denied to the Judges of the land. To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand.

It is needless to quote authority on this topic from legal, philosophical, or historical writers. It moves Bentham over and over again. But among historians the grave and enlightened verdict of Hallam, in which he ranks the publicity of judicial proceedings even higher than the rights of Parliament as a guarantee of public security, is not likely to be forgotten.

I myself should be very slow indeed (I shall speak of the exceptions hereafter) to throw any doubt upon this topic. The right of the citizen and the working of the constitution in the sense which I have described have upon the whole since the fall of the Stuart dynasty received from the judiciary—and they appear to me still to demand of it—a constant and most watchful respect. There is no greater danger of usurpation than that which proceeds little

by little, under cover of rules of procedure and at the instance of Judges themselves. I must say frankly that I think these encroachments have successive encroachments.

To begin with it was not so. No encroachment upon the broad stipulations of the statute of 1857 may have at first occurred. But two years after the Act was passed the cases of *Barnet v. Barnet*, and of *H.* (falsely called *C.*) *v. C.*, were tried. In the former, which was a suit by a wife for judicial separation on the ground of cruelty, her counsel asked that the evidence might be taken before an examiner. The meaning of that, my Lords, was that it was a motion almost in express terms that the secret procedure which has been ended by Parliament should be resumed by the Court. The motion was refused by Sir Cresswell Cresswell. In the latter, which was a suit to declare a nullity a marriage, on the same ground as in the present case, counsel asked that the cause might be heard in camera. The motion came on for hearing before the full Court—namely Sir Cresswell Cresswell, the Judge Ordinary, Mr. Justice Williams, and Baron Bramwell. The judgment of Baron Bramwell was conclusive, none the less so that he indicates that he knew already that the practice which he was condemning as illegal was already creeping in.

My Lords, I think it would have been better had those attempts to evade publicity commanded by the statute then ceased and the judgment of Baron Bramwell been accepted as law. But the respondents found expressions of opinion such as those to which I now refer. In *C. v. C.*, in the year 1869, Lord Penzance, dealing with a case which was not a suit for nullity, made this observation: "The only cases which have been heard in private are suits for nullity of marriage, and in doing so the Court has followed the practice of the Ecclesiastical Courts which it is expressly empowered to do in such suits by the 22nd section of 20 and 21 Vict. ch. 85." My Lords, that point was not a point of decision. I do not see that any argument upon the subject was presented to the Court. I cannot take the learned Judge as having laid down that the practice of the Ecclesiastical Court was anything other than what is recorded with much authority by the Ecclesiastical Commissioners in the passage which I have cited.

The next expression founded upon is that by Sir James Hannen. It is clear that that learned Judge was much

exercised upon the subject: for, having cited the judgments of Sir Cresswell Cresswell and Mr. Justice Williams and Baron Bramwell, to which I have just referred, "that the Court had no power to sit otherwise than with open doors," the learned Judge adds: "It would seem, however, that that rule had not been acted upon. On the contrary, such cases have been heard in camera both by my predecessor and myself, and I therefore think it must be taken that the impression which was entertained by Sir Cresswell Cresswell was afterwards abandoned."

I must say, my Lords, that, accepting this as historically accurate, it appears to me to be a confession of a progressive departure from the law. No doubt it bound the learned Judge, but it is an illustration of that to which I have already alluded—namely, the liability, unless the most vigorous vigilance is practised, to have constitutional rights, and even the imperative of Parliament, whittled away by the practice of the judiciary. It was no wonder that in the latter case in 1876, even the Master of the Rolls, Jessel, made an exception to the rule of open Courts of Justice of "those cases where the practice of the old Ecclesiastical Courts in this respect is continued." But it is perfectly manifest that the practice of the old Ecclesiastical Courts was not continued. Taking evidence under private examination was stopped. What was continued was the remainder of the practice, which was open, and the closed portion was by statute declared also to be open. But while this observation was made by Sir George Jessel, obiter in that case, his judgment upon the main question was one that must command respect. He "considered that the High Court of Justice had no power to hear cases in private, even with the consent of the parties, except cases affecting lunatics or wards of Court, or where a public trial would defeat the object of the action." These, my Lords, constitute the exceptions definite in character and founded upon definite principles, to which I shall in a little allude.

My Lords, it is very necessary indeed, to make, in the matter of contempts of Court, clear distinctions. One has, for instance, to distinguish acts external to the administration of justice and truly subversive to it. These are essentially of a criminal character. They tend to prejudice a party to a suit in the eyes of the public, the Court, or the jury, or to intimidate witnesses, or interfere with the course

or achievement of justice in a pending action. The case of O'Shea was of this class. One has also to distinguish acts—also essentially criminal in their nature—act of disturbance, or riot, which prevent the business of a Court of Justice being duly or decorously conducted.

In both of these cases a Court can protect its administration and all those who share or are convened to its labors. And in both cases the authors of the prejudice or intimidation, on the one hand, or the participators in the disturbance or riot, on the other, are guilty of a contempt; and a Court of Justice can protect itself against these things, both by suppression and by punishment.

But here, my Lords, the question affects not such a power, viz., to see to it that justice shall be conducted in order and without interruption or fear, but a power—for that is what is really claimed—to make the proceedings of an English Court of Justice secret because of something in the nature of the case before it.

Upon this head it is true that to the application of the general rule of publicity there are three well recognized exceptions which arise out of the nature of the proceedings themselves.

The three exceptions which are acknowledged to the application of the rule prescribing the publicity of Courts of Justice are, first, in suits affecting wards; secondly, in lunacy proceedings; and thirdly, in those cases where secrecy, as, for instance, the secrecy of a process of manufacture or discovery or invention—trade secrets—is of the essence of the cause.

But I desire to add this further observation with regard to all of these cases, my Lords, that, when respect has been paid to the object of the suit, the rule of publicity may be resumed. I know of no principle which would entitle a Court to compel a ward to remain silent for life in regard to judicial proceedings which occurred during his tutelage, nor a person who was temporarily insane—after he had fully recovered his sanity and his liberty—to remain perpetually silent with regard to judicial proceedings which occurred during the period of his incapacity. And even in the last case—namely, that of trade secrets—I should be surprised to learn that any proceedings for contempt of Court could be taken against a person for divulging what had happened in a litigation after the secrecy or confiden-

tiality had been abandoned and the facts had become public property.

The present case, my Lords, is not within any of these exceptions, and is not within the ratio or principle which underlies them. The learned Judge himself, following certain encroachments of authority, made a general exercise of power concerning proceedings of a certain nature in his Court, and really bringing the denial of the open administration of this part of the law within the range of ordinary judicial discretion.

I may be allowed to add that I should most deeply regret if the law were other than what I have stated it to be. If the judgments (first, declaring that the cause should be heard in camera, and, secondly, finding Mrs. Scott guilty of contempt), were to stand, then an easy way would be open for Judges to remove their proceedings from the light and to silence for ever the voice of the critic and hide the knowledge of the truth. Such an impairment of right would be intolerable in a free country, and I do not think it has any warrant in our law. Had this occurred in France, I suppose Frenchmen would have said that the age of Louis Quatorze and the practice of *lettres de cachet* had returned.

As an instance of the watchful attention of the Legislature in regard to any possible exceptions to the rule of publicity, section 114 of the Children's Act, 1908, may be referred to. It provides for the exclusion of the general public in the trial of offences contrary to decency or morality, but this exclusion is to be only during the giving of evidence of a child or young person, and under this proviso, that "nothing in this section shall authorize the exclusion of *bona fide* representative of a newspaper or news agency." I may add that for myself I could hardly conceive it a likely thing that a general rule consigning a simple and inoffensive case like the present be tried in camera could ever be made; but that is a consideration which is beyond our range as a Court administering the existing law. Upon the basis of that law, I am humbly of opinion that the judgments of the Courts below cannot stand.

NOTES ON THE HISTORY OF COMMERCE AND COMMERCIAL LAW. 1. ANTIQUITY.

Of the peoples of antiquity the Assyrians, Phœnicians, Egyptians, Greeks, Carthaginians and Romans played important roles in the history of commerce. The names of Babylon, Nineveh, Tyre, Alexandria, Corinth, Carthage and Rome came down to us as almost symbolic of wealth and luxury, and the aggregation of great wealth is of itself an index of commerce.

Of the commercial law of all save the Greeks and Romans little is known. No fragments have been preserved.

The Phœnicians, whose history as a nation closed with the conquests of Alexander the Great, were renowned as a race of navigators. They developed a maritime trade of such proportions as scarcely to be rivalled until the Middle Ages. They were a naturally peaceful and keen race. In this they were in contrast to their colony, Carthage. The commerce of Carthage was imposed by force and was in its turn destroyed by Rome. Her walls were razed, her citizens killed and scattered and her fleet destroyed. No vestige of her law remains.¹

The first commercial laws of which any knowledge exists are those of the Dorian Islands of Rhodes, in the Mediterranean, and of these we have only indirect knowledge through the Roman law. Geographically Rhodes was so placed as to be an easy distributing centre of Levantine and Phœnician goods. There is reason to believe that the Rhodian law was not simply a body of customary law, but that it was reduced to writing. A text of the Digests of Justinian treats "*De lege rhodia de jactu*."² The use of the word *lex* in this connection here and elsewhere indicates that the Rhodian law had emerged from the customary state; the use of quotation points to a text. In the Digests is to be found the decree of Antoninus by which the Rhodian law was adopted into a Roman law in so far as it did not conflict with the latter.³

¹ Octave Noël, *Histoire du Commence du Monde*, Vol. 1, Chap. IV. Pardessus, *Us et coutumes de la mer*, Vol. I.

² Digests of Justinian, XIV. 2. The "*De lege rhodia de jactu*" commences "*Lege rhodia, ut, si levandae navis . . . etc.*"

³ Digests, XIV. 2 sec. 9. "*Ego quidem, mundi dominus, lex autem maris, Lege in rhodia, quae de rebus nauticis praescripta est, judicatur, quatenus nulla nostrarum legum adversatur. Hoc idem Divus quoque Augustus judicavit.*"

The Rhodian commercial law was a maritime law. It influenced the law of Athens, as is to be surmised by the strong likeness which the latter bears to it.⁴ In view of the influence and the authority which it enjoyed throughout the Mediterranean, it is not too much to say that the Rhodian law constituted the *jus gentium* of the seas until the Middle Ages. It is the first source of maritime law.

If the Rhodian commercial law was the first of which we have knowledge, the Athenian laws are the first of which we have texts.⁵ Those of Corinth, the most thriving commercially of all of the Greek cities, have perished. But in Athens, in the liberty to traffic, in the guaranties of performance of contracts, in the regulation of the merchants' books and their probative value, in the importance of commercial associations, in the laws of surety, in a commercial jurisdiction, a peculiar characteristic of which was the division of the year into the navigable season and the unnavigable season, during the latter part of which the litigation was carried on of those questions which had arisen during the former season;⁶ in the penalties attaching to the failure to prove an accusation made against a merchant—in all this is evidence of an intent to encourage trade.⁷ The maritime law of Athens reached a high state of development, containing provisions relating to ship owners, captains, seamen, passengers, cargo, transport and general average, while those relating to bottomry have come down with remarkably little modification into modern law.⁸

The city of Marseilles, in Gaul, was a Greek colony, founded as early as the time of the Roman kings, by the city of Phocis, in Asia Minor. From the mother city was brought a maritime law already developed, founded on the Rhodian law. None of it survives directly; Livy and Tac-

⁴ Blanco Constans, *Derecho Mercantil*, Vol. 1, p. 172. Alvarez de Manzano, *Curso de Derecho Mercantil*, Vol. 1, p. 176. Boulay-Paty, *Cours de Droit commercial maritime*, Hist. Introd., p. 7-9. Pardessus, *Us et coutumes de la mer*, contends that it was the Athenian law that influenced the Rhodian law.

⁵ Orations of Demosthenes; "Lacritus," p. 949-950: "Aristogitonem," p. 844-845. Boulay-Paty, p. 24. Caillemier, *Etudes sur les antiquités juridiques d'Athènes*. Beauchet, *Histoire du droit privé de la République Athénienne*.

⁶ The navigable period was from March 28 to Aug. 23. Boulay-Paty, p. 22, note 2.

⁷ Pardessus, *Us et coutumes de la mer*, p. 39. Desjardins, *Introduction historique à l'Etude du Droit commercial maritime*, p. 8.

⁸ Alvarez de Manzano, Vol. I, p. 179.

⁹ Manzano, Vol. 1, p. 179.

tus mention it and traces of it are found in the numerous municipal statutes of Marseilles of the thirteenth century.*

The Romans were not a commercial people, but their dominion exercised a great influence on commercial law. In their early history we know that they were an agricultural race. For the first two centuries they did not develop a trade either by land or sea. But the spirit of conquest and the ambition to dominate the world could not leave them insensible to the importance of commerce as a help to their ends. The rivalry of Carthage, whose navy controlled the Mediterranean, led Rome to build a fleet. After her rival had been destroyed her own importance as a sea power declined. The Mediterranean became infested with pirates and Pompey undertook a war of extermination. Only so could the seas be rendered safe for the merchants who centered their traffic on Rome, which was becoming yearly more dependent upon foreign supplies. The nation was a naval power from necessity rather than from choice.

As Rome became more and more the centre towards which flowed the wealth of the world, agriculture declined and Italy, even during the later republic, could not provide her own subsistence. Sicily and Africa supplied the city with grain, and the port of Ostium was built to give greater assurance to the safe arrival of the grain fleet.

The legions rolled the line of battle farther and farther from the capital city and within these limits reigned peace, or comparative peace, extending over centuries, such as had not been known before. This of itself was enough to cause commerce to spring up and flourish. But it was also in the interest of the dominant people, who enriched themselves by booty and tribute, to organize the subject peoples into provinces that should thrive economically. While the provinces produced, Rome consumed. Her commerce was one of importation.

It is not surprising that, disdaining trade himself, the Roman should have encouraged it in others. To the assurance of peace he added the dignity, science and unity of the Roman law. Highways were established and policed, which put in communication the distant parts of the Empire. These, if built primarily for military purposes, gave a fresh impetus to commerce.

* Boulay-Paty, *Introd.* sec. 3. p. 29.

Accumulation of wealth through conquest and contact with Greece and the East created the love of luxury and idleness which led to the withdrawal of the Roman citizens more and more from public life, even from command in the great military machine, and to final national decay. In the activities of the city the non-Roman was conspicuous. In the provinces non-Romans were the producers and in the city itself theirs were the mercantile hands through which these products flowed.¹⁰

In Roman law the non-Romans were known as *perigrini*. They played a highly important part in the development of Roman commerce, and the law which was applied to them played an equally important part in the development of the commercial side of Roman jurisprudence.

The free people of the Roman State, under private law, were divided into: 1. Roman citizens; 2, Latins; 3, *perigrini*.¹¹

The Roman citizen was he who by reason of his Roman parentage enjoyed the full rights of citizenship under the *jus civile*. This included the *conubium* or right to intermarry with a Roman and found a family under the *jus civile*; and the *commercium* or right to receive and transmit property according to the *jus civile*.

The term Latin was first applied to the inhabitants of Latium. Later it came to designate those upon whom limited rights of citizenship had been conferred, sometimes including both the *conubium* and *commercium*, but more often only the *commercium*.

The *perigrini* were at first pure foreigners. With time they became subjects without being Romans. Neither in private nor in public law did they enjoy any of the privileges of citizenship. Neither the *conubium* nor the *commercium* was theirs and they were unable to protect their rights through the legal actions offered by the *jus civile*.

¹⁰ For the Roman History of commerce and commercial law see: Mommsen, *History of Rome*; Goldschmidt, *Handbuch des Handelsrechts*, 3rd Ed.; Pardessus, *Collection des lois maritimes antérieures au XVIII siècle*; Boulay-Paty, *Cours de Droit commercial maritime*, Introd. p. 33 et seq.; Molinier, *Traité de Droit commercial*, Vol. I: Lyon-Caen et Renault, *Traité de Droit commercial*, Vol. I, p. 11; Cossack, *Traité de Droit commercial* (translation from the German by Mia) p. 9; Vivanti, *Traité de Droit commercial* (translation from the Italian by Escarra) sec. 2, p. 1 of Introd.; Gustave Noël, *Histoire du Commerce du Monde*, Vol. I, Chap. IV.; Manzano, *Curso de Derecho Mercantil*, Vol. I, p. 181; Constan, *Derecho Mercantil*, Vol. I, p. 174.

¹¹ Girard, *Droit Romain*, p. 104, et seq.

This is not to say that they lived outside the pale of all law. They had their own law composed of: 1, Acts passed by the Romans applicable to them: 2, their own national law, and, 3, the *jus gentium*.

The *jus civile* is the law which a nation applies strictly to its own citizens; the *jus gentium* is the law which a nation applies to the foreigners within its territorial limits. The tendency is for these two bodies of law to approach each other. In the domain of private law to-day in most advanced countries the foreign resident enjoys almost every right that the national enjoys, while many instances could be cited of the spread of the tendency even to public law. But in antiquity the contrary was true. The *jus civile* was jealously limited to nationals.

The history of Roman law covers eleven centuries and during this period great organic changes took place. Of these none is more interesting than the influence of the *jus gentium* over the *jus civile*.

The *praetor* was the most important judicial officer of the Roman State¹² and in the 512th year after the founding of the city, a special *praetor* was named for the *perigrini*. At the hands of these officers the *jus gentium* received its development. Upon application of the litigant the *praetor* formulated the case and turned it over to the Judge to establish the facts, directing what the judgment should be upon certain findings of fact. It is seen that the Judge's functions were more nearly those of our jury.

This power¹³ of the *praetor* over the procedure was negative in its character. He could not refuse to recognize already existing actions, nor grant new ones; but by creating defences he accomplished the same end.

Upon entering office the *praetor* posted an edict in which he listed all the actions and defenses which he would grant during his term of office. Gradually a large part of this became permanent, each *praetor* adopting a part of the edict of his predecessor in office.

¹² The judicial power first resided in the kings, from whom it was passed on to the consuls on the establishment of the Republic. The consuls were gradually despoiled of many of their original powers. They were deprived of the judicial power by the creation of the office of the *praetor* in the 387th year of the city.

¹³ The added power was conferred by the *Lex Aebutia* in the first years of the seventh century of the city. Girard, p. 37.

This became known as the Perpetual Edict and was a fruitful source of law. The *praetor* drew largely from the *jus gentium*, which in this way passed into the Roman law.

While the law regulating the family relations, marriage and inheritance, remained the special province of the *jus civile*, the law of contracts, of personal property and of the acquisition of property was profoundly affected by the praetorian law. Now, it is just this law of personal property and of contracts that is the domain of the commercial law.

Besides the *praetor* there existed the office of the *Aedile*,¹⁴ in whose charge was the policing of the markets. He, likewise, published an edict upon entering office, which was another source of Roman commercial law. The *praefectus annonae*¹⁵ was an administrative officer having under his charge ship owners and traders in grain. The judicial power which they acquired made of them to a limited degree, commercial judges.

There was, therefore, in Rome, no law special to commerce such as sprang up in Europe in the Middle Ages. In the English common law the refinements and exceptions to which the exigencies of commerce gave rise have found their place in logical subordination to fundamental principles. So in Roman law, the peculiar genius of this people, working particularly through the *praetor*, succeeded in grafting to the fundamental principles of contracts as already worked out in the *jus civile* those practical reforms needed for commerce, and in welding the whole into one solid structure, cosmopolitan, simple, and philosophic.

Roman law, and particularly the *jus gentium*, was not unfavourable to commerce.¹⁶ The law of contracts was founded on the principle of liberty; a maximum rate of interest was fixed; there were no restrictions as to the form of contracts of sale, of association, or of work and labour; to the creditor were given severe penalties against his debtor; contracts were liberally interpreted according to the intent of the parties, in the presence of good faith.

¹⁴ Girard, p. 301, 562, 564. When a vendor did not reveal the defects in the goods the purchaser was protected by an action *redhibitoria*, granted by the *Aedile*.

¹⁵ Girard, p. 971, 1064, 1067.

¹⁶ Cossack, sec. 3.

It remains to examine a few of the Roman laws applying to commerce. Those having exceptional application were few because of the law's unity. When there were any such they were generally maritime and the very special conditions of maritime trade have always given rise to special laws.

As might be expected, the laws having a bearing on commerce are found in great part in the Perpetual Edict.

Two laws ¹⁷ of similar character were enforced: 1. By the action *de exercitoria*, and 2, *De institoria*. It was the principle of the *jus civile* that a debt could not be contracted through a representative, at least that a principal could not be made liable for more than the actual benefit which had accrued to him under the contract. The *praetor* held the principal liable, through the action *de exercitoria*, for the debts contracted by the captain of a ship to whom as his representative the principal had intrusted a commercial venture by sea. The action *de institoria* was a parallel action holding the principal liable for a debt contracted by an agent in a commercial venture on land.

An action was allowed holding the masters of ships, inns, and stables, responsible for injury to property entrusted to their guardianship, even though the injury occurred through no fault of theirs, provided that it was not caused by an act of God.¹⁸

The action *de tributoria* ¹⁹ was a supplementary action to the older action *de peculio*. The *peculium* was the property intrusted by a master to a slave to be administered by him. The old action *de peculio* made the property thus intrusted answerable for the contracts of the slave entered into in the course of his administration. When, however, the slave, with the knowledge of the master, ventured to use the *peculium* in commerce, the supplementary action *de tributoria* held the master liable personally, beyond the limits of the *peculium*.

The action *Pauliana* ²⁰ was an action against fraudulent debtors. This action is interesting for, along with the *missio in possessionem* and the *venditio bonorum*, it is a precursor to the modern law of bankruptcy. By the law of

¹⁷ Digests XIV. 1 and 3: Girard, p. 96, 662, 664, 668.

¹⁸ Digests, IV. 9, *Actio de recepto nautarum, cauponum stabulariorum*.

¹⁹ Digests, XIV. 4: Girard, p. 665, 666: Cossack, sec. 3, p. 9.

²⁰ Digests, XLII. 8: Girard, p. 442.

the Twelve Tables the creditor might put his debtor to death or sell him into slavery. This was moderated to imprisonment and attachment of the debtor's property. The creditors were placed in possession (*missio in possessionem*) of the entire estate of the debtor which, after a certain period, was sold in a lump to the highest bidder (*venditio bonorum*). But up to the time when his creditors were placed in possession there was no restraint upon the debtor, who was left free to commit any fraud he pleased upon his creditors, increasing his insolvency by alienating his property and assuming new debts. The *praetor*, through the action *Pauliana*, corrected this by permitting the creditor to follow the property alienated in fraud through the hands of as many persons as it might have passed, provided that they had knowledge of the fraud.

The *receptum argentarii* ²¹ was an Act having the resemblance to the modern acceptance of a bill of exchange. A banker who promised to pay the debt of another was bound by his promise even though it turned out that the other owed no debt.

The main sources of the Roman commercial law are the Rhodian law, the Perpetual Edict, the Theodosian Code published in 438 A. D. by Theodosius II. in the East, and Valentine III. in the West, the *Corpus Juris Civilis of Justinian* (529-534 A.D.), and the *Basilica*, a revision of the Justinian collection in Greek commenced by the Emperor Basil in Constantinople in 877. In the East the *Basilica* remained the law till the Turks took Constantinople in 1453.

In summarizing what is scarcely more than a summary itself, certain features of the commerce and the commercial law of antiquity stand out with prominence.

Before Rome the Mediterranean commerce had reached a high state of development, especially at the hands of the Phoenicians. However, no law has come down to us until the period of the Greeks. The Rhodians developed a maritime law of which we have indirect knowledge and which is the source of modern admiralty.

The Romans as a race were distinctly uncommercial, yet the effect of the peace which they promoted encouraged commerce in other people; the wealth which accumulated

²¹ Girard, p. 604.

through conquest and tribute made them consumers rather than producers; their genius for law enabled them to develop a system of contract law favourable to commerce, based upon the classic *jus civile* and inspired by the equitable principles of the *jus gentium*. This law was characterized by the same scientific unity as the English common law. Its scientific development was in part due to the large powers of the *praetor* to mould procedure, amounting almost to legislative prerogatives.

With the fall of the Western Empire and the domination of Europe by invading barbarians there followed a period of anarchy when commerce almost disappeared. An immense amount of wealth was destroyed and real property became almost the only kind of wealth recognized. Centuries were required for Christianity, and the germ of the ancient civilization to quicken society into self-consciousness. But while Christianity in so far as it liberated the individual and ennobled labour was favourable to commerce, yet through the Canon law it fettered it and led the Roman law away from a true economic development. With the rise of the Third Estate came a new era for commerce.

LAYTON B. REGISTER.

—*University of Pennsylvania Law Review.*

EDITORIAL.

LIBERTY OR LICENSE.

His Honour Judge Morson recently heard an appeal from the findings of the Police Magistrate of the city of Toronto of a certain drama which had been held to be immoral, and His Honour in an able judgment reversed the magistrate's decision. During the past two years a certain section of the community has arrogated to itself the right to decide what is proper or improper in theatrical matters and has assumed to impose its views upon the community at large. While freely admitting the right of any one to hold an opinion on any subject, so soon as it is sought to impose any particular view upon the public any person or section exceeds that right and naturally causes resentment from those who hold a different view. The people of Canada, it is hoped, have outgrown their swaddling clothes and do not require to be fed by bottle or spoon, but are able to form their own opinion of what is right or wrong without any dictation from any person or section.

Of the merits of the case we have nothing to say, but every thinking person, no matter what their calling, should, and undoubtedly will, resent uncalled for attacks from pulpit and press upon a Judge who does his duty fearlessly and who on account of the judicial position he occupies makes it impossible for him to reply. Some excuse may perhaps be made for those who, in excess of their zeal, overstep the bounds of justice and decorum, but no excuse can be offered for the Police Magistrate, if the newspaper reports of his utterances are correct, who deliberately misquotes the text of the judgment of an appeal from a decision of his own.

There is such a thing as Legal Ethics, but apparently it is a subject in which not only students but magistrates require some instruction.

The *Law Times* has been honoured by the permission of the Honourable Mr. Justice Middleton to publish his introduction to the draft of the revision of the Consolidated

Rules of Practice. Any comment as to the wisdom shown by the Premier in making so happy a choice would be superfluous, for the long and varied experience of the learned Judge has fitted him most eminently for the task intrusted to him, and it is hoped that the members of the Bar in general will avail themselves of the opportunity which His Lordship gives to forward to him "any changes which may be deemed desirable, before the report is sent to the Government."

OSGOODE HALL,

10TH APRIL, 1913.

DEAR SIR:—

In pursuance of instructions received from Sir James P. Whitney (acting Attorney-General), I have prepared a draft revision of the Rules of Practice and Tariff of Costs.

By the courtesy of the Attorney-General, I am permitted to submit my draft of these rules for criticism before reporting to him; and I am transmitting to you herewith the result of my labours, for your perusal and consideration. If on perusal you find occasion, I shall be glad if you will, at your earliest convenience, communicate with me, so that any changes which may be deemed desirable may be made before I send my report to the Government.

When the Judicature Act of 1881 was passed, a schedule of rules was also enacted, taken from the English Judicature Act of 1873. These rules did not purport to deal with the entire practice of the Court, but provided that in matters not dealt with the practice of the Courts consolidated, that was most convenient should be followed. This brought about much confusion, as standards of convenience differed; and in 1888 a revision of the rules took place, when an endeavour was made to formulate a complete code of practice. To the rules originally introduced from England were added others having an English origin, and many of our former Chancery Orders and Common Law rules; but throughout this revision there were many provisions that the practice should be as in the "Court of Chancery prior to the Judicature Act."

In 1897, the rules were again revised. Many of these allusions to former practice were eliminated, and much was done to remove difficulties that had developed in the working of the former rules; yet the composite origin of the system was plainly apparent, and there remained a

lack of uniformity of expression arising from this. In many cases, also, there was an overlapping of provisions adopted from different sources, which occasioned obscurity and confusion.

In the present revision my endeavour has been to complete the assimilation thus begun, and the elimination of references to former practice. Comparatively few of those now engaged in practice had any experience before the Judicature Act, and any allusions to the practice, either at law or in equity, prior to 1881, are to the majority meaningless, and the occasion of needless research.

Many of the rules which contained no express reference to any prior practice were originally prepared for the purpose of modifying the practice then existing, and are only to be understood in the light of the situation at the time they were enacted. These provisions are frequently negative in form, and amount to no more than the repeal of former rules, or, more frequently, the annulling of a practice that had grown up apart from any express enactments.

Many other rules had their origin in an attempt to meet some particular difficulty, and have now become unnecessary by reason of some more far-reaching change in the practice or in general law.

Other provisions had their origin in a statute passed to remedy some particular matter; the main provision of the statute being accompanied by a number of ancillary provisions, in some cases differing in detail from somewhat similar general provisions of the rules, but now not necessary, by reason of wide general provisions. In this revision I have endeavoured to make the rules a consistent whole, capable of being understood without any reference to the origin of the particular rule or to any former practice.

I have also endeavoured to reduce the practice to the greatest possible degree of simplicity, and so to classify the rules that what is required to be known may be readily found. To this end, general provisions have been made, applicable to all procedure, and in this way much repetition is made unnecessary, *e.g.*, in the former revisions almost every section conferring power upon the Court directed it to be "exercised "upon such terms as to costs and otherwise as may be just;" and almost every time limit is accompanied by the expression "or such further or other time as the Court or Judge may allow." The disappearance of these

familiar expressions does not mean change, but merely that general provisions apply and render repetition unnecessary.

Another familiar expression eliminated is "the Court or a Judge." This expression had its origin in the theory that the expression "the Court" referred to the Court sitting *en banc* during Term; and, to enable a function to be exercised otherwise than by the Court so sitting, the words "or a Judge" were added. This theory and expression appear to be obsolete. In these rules I have conferred all power upon the Court, and have by a general rule defined how the powers of the Court are to be exercised, *i.e.*, by a single Judge sitting in Court, save in certain cases where that power may be exercised by a Judge in Chambers, Local Judge, or the Master in Chambers.

The former rules contained many detailed provisions concerning the officers of the Court and the discharge of their duty. These seem unnecessary; and it was thought better to leave these details to be worked out by Orders in Council dealing with the appointment of officers and their duties, and by directions from the Judges and the Clerk of the Crown and Pleas and to the Inspector of Legal Offices.

In addition to many minor changes embodied in the revision, in the interest of simplicity and uniformity some changes of importance are suggested; and to these attention is respectfully drawn.

One of the greatest problems in the framing of rules of practice is to devise a system which will at the same time afford a simple and speedy mode of enforcing admitted or undisputed rights, and yet be sufficiently elaborate and elastic to be adequate to the working out of important disputes and the adjustment of intricate and complicated matters. To this end it is essential that there should be at the threshold some means of separating cases in which there is a real dispute from cases in which there is no real dispute, but an attempt to abuse the practice by the setting up of some pretended defence. At one time our Courts were congested with actions upon notes, bills of exchange, and mercantile accounts, where there was no real question as to the liability of the defendants, but which were defended, and had to be taken to trial before judgment could be obtained. At that time, with a population of less than one-tenth of that at the present day, the Assize lists were longer than now.

Examinations under the Common Law Procedure Act, which enable a defence admittedly untrue to be struck out, afforded a partial remedy. Since the Judicature Act a motion for judgment after appearance, which calls upon the defendant to disclose his defence upon oath, has proved yet more efficacious; but even in this there is much waste and delay. The decisions have established the plainly just principle that summary judgment can only be granted where there is no issue to try; hence, judgment cannot be granted where there is a conflict of evidence, and the result of the motion depends solely upon the defendant's affidavit. Where the defendant makes an affidavit disclosing any defence there is no doubt as to the result of the motion, and it becomes a purely formal matter.

These rules provide for the elimination of the plaintiff's affidavit and of the formal notice of motion to be served after appearance, and substitute a special form of writ, calling upon the defendant, where the writ is especially endorsed to at once file an affidavit shewing the nature of his defence. The plaintiff is then given the option of treating the affidavit so filed as constituting the statement of defence to his claim endorsed upon the writ and of entering the action for trial without formal pleadings. Three weeks' notice of trial is required in this case, so as to afford opportunity for discovery and preparation for trial. The plaintiff may, at his election, cross-examine the defendant upon the affidavit, and if the plaintiff thinks fit he may move for judgment upon such cross-examination. He thus makes his motion for judgment after he has an opportunity of considering whether it is likely to succeed.

Wherever a writ is specially endorsed, the special endorsement will stand as the statement of claim, and the defendant must file his defence in the usual time after appearance.

While these provisions, it is hoped, will be found sufficient to prevent vexatious defences, it has been difficult to devise any entirely satisfactory remedy for vexatious actions. The temptation to bring an action without sufficient cause is not so great as the temptation to defend without reason. Under certain statutory provisions, security for costs may be ordered in classes of actions in which unfounded suits are more prevalent, *e.g.*, libel actions, and actions against public officers.

The classes of cases in which security can be ordered has been somewhat enlarged. Where, on the plaintiff's examination, his case appears to be frivolous, power is given to order security; and a similar provision has been made where a worthless plaintiff has been chosen to prosecute a class action really in the interest of others. He is not a nominal plaintiff under the present decisions, as he is asserting his own right as a member of the class. Farther than as suggested in the rules relating to security it is not safe to go.

Another change is the abolition of the Order to Produce. An affidavit on production is directed to be filed ten days after the time for defence. For many years an order to examine was considered necessary. Its abolition has produced no inconvenience while reducing expense. This change is upon the same line.

Petitions are abolished. All actions are to be instituted by writ; all other proceedings by originating notice; all interlocutory proceedings by a notice of motion.

The scope of originating notice has been much enlarged. Under the present rules this procedure is confined to questions arising in the administration of an estate. In the new rules it is made to apply to the determination of any question upon the construction of a will or document, and is also made to afford means for determining in a summary way any question arising between parties when there is no question of fact in issue.

Provision is made for determining any question under the Vendors and Purchasers Act upon originating notice, and for giving notice to any person having a claim or suggested claim giving rise to the difficulty, so that the decision may be binding upon him as well as upon the vendor and purchaser.

Provision is also made that any question which would arise upon a quieting titles application may be determined in a summary way. Frequently titles have to be quieted where there is only one matter which really requires determination.

A provision has been adopted from the English Partnership Act relating to realization upon the share of a partner against whom a judgment has been recovered.

Some of the provisions found in the former rules have been omitted because they are now to be found in particular statutes; *e.g.*, rules relating to bailable proceedings and ab-

sconding debtors, rules relating to solicitor and client taxation, and to *quo warranto*.

The result of all this has been to reduce the total number of rules to little more than half the number of existing rules.

The summons for directions which has been adopted in the English practice has not commended itself to me. In practice in England it appears not to have accomplished that which was hoped from it. No doubt if counsel of ability, familiar with the details of the particular case, appear before an experienced Judge and discuss the procedure in the particular case, the result ought to be satisfactory; but the actual result is far otherwise when the factors are different; and in practice it has been found that in most instances a stereotyped form of order is used, which follows the general provisions found in the rules.

In a contributed article in the *Law Times* (133 L. T. 565), it is said: "The compulsory summons for directions, from which certain Judges hoped for so much, has proved very ineffective, and is deemed by all barristers in large practice with whom I have discussed it to perform the same functions as the fifth wheel of a coach. One has only to read the orders made on these summonses to see that they are all of a stereotyped character, and in the majority of cases wholly unnecessary." The editorial comment on this is: "It is difficult to see what useful purpose the summons for directions has served, and in the vast majority of cases it is wholly unnecessary."

In these rules provision is made for the directing of a speedy trial upon an injunction motion, and to permit a motion for judgment in mercantile cases immediately upon the issue of the writ. Attention is also drawn to Rules 142, 145, and 156 relating to pleading.

The tariff of costs has been the occasion of much thought. I have been assisted in framing a new tariff by committees of the Ontario Bar Association and the County of York Law Association. As the new tariff of solicitor's fees departs widely from the tariff now in use, it may be well to give at length the reasons for recommending it.

Two leading ideas must be kept in mind. As has often been said, natural justice demands that in ordinary cases the losing party should pay the costs; not upon the principle that "to the victor belongs the spoils"—for costs are not to

be regarded as spoils, but as an indemnity to the successful party who has been compelled to resort to the Courts to obtain his rights.

The second is that in cases in which costs are awarded, the amount actually given should be as nearly as practicable an indemnity for the costs necessarily incurred. If costs taxed do not amount to the sum which the successful party must pay his solicitor, to that extent the purpose fails for which the costs are given: "that he may be indemnified for the costs occasioned by his unjust vexation."

At the same time, such safeguards must surround the taxation of costs as to avoid costs being made an instrument of oppression. The temptation is ever present, not only to the solicitor but to the client, to incur costs in the hope that the opponent will in the end have to pay. This sometimes is from malice or greed; more often with the idea that the client's interest will be served by making it plain that litigation can be made so burdensome that an opponent had better accept any compromise offered.

The proposition has been repeatedly made that in the interest of the public and the solicitor the costs of litigation should be definitely fixed and ascertained, so that the parties might know in advance exactly how much is risked in litigation. The experiment has been tried by limiting the amount to be awarded as party and party costs, and has been found to be a failure. The solicitor for the successful party must be paid for the services actually rendered; and his opponent, knowing this and knowing that he incurs no additional risk, deliberately sets himself to increase the burden of the excess of solicitor and client costs over and above the party and party costs than can be awarded. Similarly, when the costs of an appeal have been fixed at a sum not adequate to indemnify, some litigants appeal every case, so as to discourage litigation with them; the verdict being sadly cut into by the excess costs. It must not be forgotten that litigation is war, that large corporations have much litigation, and that some frame their policy in dealing with litigants in such a way as to make litigation so full of terror, by reason of expense and delay, as to bring about the settlement of the majority of claims at much smaller sums than the claimants are really entitled to receive.

When any so-called "block tariff" is devised, if it is not to be in itself burdensome it must be based upon the actual costs of litigation conducted on economical lines. Then it

becomes an easy matter, when the extra expense has to be borne by the opponent, to make the actual cost exceed the amount fixed. In some jurisdictions where the experiment has been tried, this defect became very plain, and a remedy was sought in a provision giving the Judge power to award a lump sum in addition to the fixed fee. This was a complete abandonment of the principle of certainty upon which the block tariff was based, besides introducing in its worst form the evils of the personal equation. When the amount allowed for costs is discretionary, there are as many different standards as there are Judges, and chaos reigns. It was found that Mr. Justice A. said: "You are lucky to have a verdict, and should not ask for extra costs from the unfortunate defendant;" whilst Mr. Justice B. would have said in the same case, "It is a close case, won by the skill of your advocate, and I shall give you a handsome increased fee."

Another objection to a block tariff is that the same allowance must be made for a case that is very simple, and for a case that is of necessity long and complicated. The doctrine of averages might be applied if all litigation were between the same litigants instead of between different parties; but there is no justice in making A. pay, in his litigation with B., part of the costs in a suit between X. and Y.

In the tariff here proposed, a modified form of block tariff has been adopted, giving a lump sum from stage to stage of the action; some of the allowances being made subject to increase in the discretion of the taxing officer or Judge. Regarded as a grouping of items now charged separately, this seems to be defensible; and an endeavour has been made to secure uniformity in the exercise of the discretion given, by providing, as now, that most of the increased fees are to be in the discretion of the taxing officers at Toronto. Where discretion has been given to local officers it was found that individual discretion varied to an extraordinary degree. Only by reference to some central authority can any uniformity be secured.

The adoption of this system will do away with the present itemized bill, and it is believed will meet with acceptance, as there is no encouragement given for unnecessary and useless proceedings.

Yours faithfully,

W. E. MIDDLETON.

PERSONAL.

It is understood that the Ontario Government has requested the appointment of a Deputy County Judge for the County of Halton, and that John W. Elliott, K.C., of Milton, will be gazetted for the appointment shortly.

George F. Shepley, K.C., has been appointed Acting Treasurer of the Upper Canada Law Society to perform the active duties which have proved too onerous for Sir Æmilius Irving.

Mr. Shepley presented the largest number of law school graduates ever presented for the call to the Bar at one time. They were forty in number and took the oath and signed to the roll before Chief Justice R. M. Meredith.

Notice of a resolution to amend the Judges Act and to provide for a number of new Judgeships in various parts of the Dominion has been given by Hon. C. J. Doherty, Minister of Justice.

The proposed amendments provide for an additional district Judge of the Province of Ontario at a salary of \$3,000 per year.

For an additional Puisne Judge of the Court of King's Bench, Manitoba, at \$6,000 per year.

For an additional Justice of the Court of Appeal for British Columbia, at \$7,000 per year.

For an additional Puisne Judge of the Supreme Court of British Columbia, at \$6,000 per year.

For an additional Judge of the County Court of Manitoba, \$3,000 per year.

For an additional Judge and Junior Judge of the County Court of British Columbia, each at a salary of \$3,000 per year.

For four additional Judges of the District Courts of Saskatchewan, each at a salary of \$3,000 per year.

For an additional Judge of the Exchequer Court, District of Montreal, \$3,000 per year.

It is further provided that the Judge of the District of Beauharnois, whose residence is fixed in Montreal, may, conditionally, upon the discharge of judicial duties in Montreal, when not required in his district, be paid a salary of \$7,000 per annum.

It is also provided that except where they are entitled to larger salaries, Judges of County Courts and District Courts be paid a salary of \$3,000 per year, from the date of their appointment, an increase of \$500 per annum.

The resolution further provides for the granting of an annuity equal to the salary of the office held by him to every Judge of a County Court who, having attained the age of 75 years, is compulsorily retired, or to every Judge having continued in office for a period of thirty years or upwards who is compulsorily retired.

Word has been received at Tilbury that Frank W. Wilson, son of Reeve A. A. Wilson, who practiced law in Tilbury for a couple of years, has recently been called to the Bar in British Columbia, and admitted to practice as a solicitor in that province. On his examinations he took a particularly high mark in practice. He has become connected with C. W. Craig, a leading counsel of Vancouver.

The legal firm of Tait, McLean and Rive, of St. John, N.B., has been dissolved, and the firm hereafter will carry on business under the name of McLean and Rive.

Frederick T. Watt will be Guelph's new Police Magistrate in succession to T. W. Saunders, resigned. He has received official notice of his appointment. The new Magistrate will enter upon his duties June 1st.

The Hull Bar Association for the district of Ottawa held their annual meeting in the Hull Court House with about twenty lawyers in attendance. Another meeting has been called when the Judges will be invited to be present, as the matter of getting a Judge to fill Judge Chauvin's place will be dealt with.

Judge Chauvin was recently appointed to take charge of Labelle District, and has only been acting temporarily in the Hull Superior Court.

A resolution of sympathy was passed to Judge McDougall in the death of his brother, the late Walter McDougall.

The election of officers for the ensuing year resulted in most of the old officers being re-elected. They are as follows: Batonnier, H. A. Fortier, M.P.P.; Syndic, Geo. C. Wright; Secretary, A. Parent; Treasurer, Wm. Gamble; Ex-

aminer, A. Desjardins; Auditors, L. A. Leduc and A. De Grandpre; Librarian, J. E. Couture; Councillors, T. P. Foran, K.C., J. W. Ste. Marie and L. Cousineau.

Guthrie, Guthrie & Kerwin, Guelph, have decided to open up an office in Hespeler. Mr. P. Kerwin and Mr. V. H. Hattin will have charge of it for two or three days each week.

The annual meeting of the Bar of the section of Three Rivers elected the following: Mr. Arthur Beliveau, Batonnier; Mr. Bruno Marchand, Secretary; Mr. Francois Desilets, Treasurer; Mr. L. D. Paquin, Syndic; Messrs. L. P. Guillet, P. N. Martel and J. A. Tessier, Members of the Council. Mr. A. Desy was named examiner, and Messrs. L. P. Guillet, Francois Lajoie and Francois Lacoursier, Members of the Library Committee.

The fiftieth anniversary of the admission to practice of two lawyers well-known in local circles was celebrated on the 9th of June, the jubilarians being Messrs. J. B. Brousseau, K.C., and C. J. C. Wurtele, K.C., both of Sorel. A meeting of lawyers of the Richelieu District was held, Mr. Justice Bruneau presiding, and as a result it was unanimously decided that the occasion should be marked by the many friends of the veterans throughout the Richelieu and adjoining districts.

The festivities opened on the above-mentioned date, this being the day of the inauguration of the June Term of the Superior Court at Sorel. An address of felicitation was read, and a presentation made on behalf of the friends of the jubilarians, after which all boarded Mr. George Magnan's yacht and repaired to the Sorel Islands where the day was spent. In the evening, a reception was held at the Court House. The committee in charge of the celebrations was composed of all the members of the Bar in the Richelieu District, headed by Francois Lefebvre, as Chairman, and by Ald. Allard, Secretary.

Mr. Wurtele is in his 73rd year, having been born at the Manoir de St. David, December 23rd, 1840, the son of Johnston Wurtele, Seigneur of St. David. He pursued his studies at Lennoxville, and was admitted to the Bar, June 3rd, 1863. He has practised throughout the 50 years at Sorel.

Mr. Brousseau is 72 years old, and was born at Beloeil, January 1st, 1841, the son of J. B. Brousseau, M.D. He was admitted to practice in 1863, after having pursued a course of studies at St. Hyacinthe College. He has served as Crown Prosecutor, and in 1878 he was elected to the Legislature as representative of Vercheres, a post he held till 1881.

T. A. Lynd, W. A. Gilchrist, and R. F. Hogarth, of Saskatoon, have formed a new legal firm of Lynd, Gilchrist and Hogarth, who open temporary quarters in the Canada block. The permanent offices will be suite 409 and 410 on the fourth floor of the building.

Before Chief Justice Meredith a number of Hamilton young men, graduates of the Law School, were called to the Bar and were presented to Court by G. F. Shepley, K.C., Acting Treasurer of the Law Society, and, on the fiat of the Judge, they were sworn in and enrolled as barristers at law. Those called were G. R. Forneret, J. D. Beasley, S. W. C. Scott, W. H. Ford and P. J. Knox, the three last named being also sworn in and enrolled as solicitors of the Supreme Court of Ontario on the fiat of His Lordship.

John. W. White, aged fifty-nine years, a prominent barrister of Chatham, passed away at his home after an illness of a year and a half. He was admitted to the Bar in 1886, and had practised in Chatham since that time.

The names of ninety-one students have been announced as having successfully passed the final examinations of the Ontario Law School, only seven having failed. Mr. J. W. Pickup heads the list of twelve honour graduates, with the gold medal, and the Chancellor Van Koughnet Scholarship, while J. L. Duncan, with the silver medal and the Christopher Robinson Memorial Scholarship, comes a close second. Third place was captured by Mr. D. A. MacRae.

The following others have passed in the order named:

F. G. Dyke, with honours and bronze medal; W. J. McCallum, with honours; T. S. Elmore, with honours; G. T. Walsh, with honours; N. L. Le Sueur, with honours; W. K. Fraser, with honours; T. Crosthwaite, with honours; G. M. Miller, with honours; P. J. Knox, with honours; J. F. L.

Cote, N. Phillips, A. H. Foster, H. F. Parkinson, J. H. Bone, A. J. Gordon, E. M. Dillon, S. Cowan, E. Sugarman, A. L. Fleming, H. Friedman, G. G. McCullough, R. R. Evans, N. S. Macdonnell, N. A. McLarty, J. P. Barlow, W. F. Schwenger, A. A. Macdonald, J. C. McRuer, J. Y. Murdock, H. R. Moses, H. L. Slaght, S. W. C. Scott, E. V. McMillan, R. W. Treleaven, W. H. Ford, C. H. Shaver, H. E. Grosch, E. Braden, G. W. Adams, A. L. Brady, C. P. Tisdall, J. Cairns, J. Wearing, L. S. Cuddy, F. H. White, A. E. Parkinson, D. A. Macdonald, A. Ellis, J. J. Greenan, B. L. Bedford, J. M. Greer, R. H. G. Ivey, M. Gordon, M. Herzlich, H. E. Wallace, H. Saunders, W. H. Cook, W. A. Dillon, C. G. French, G. M. Willoughby, W. G. More, F. C. Gullen, E. H. Senior, J. M. Donahue, G. R. Forneret, J. H. McDonald, A. C. Bell, P. D. Wilson, A. J. Fraser, E. F. Byrnes, R. W. R. Shearer, S. R. Broadfoot, M. C. McLean, W. B. Sifton, A. Gilmour, Wm. Proudfoot, J. D. Beasley, M. D. McCrimmon, R. D. Ponton, J. H. Flett, E. D. O'Flynn, T. M. Costello, P. R. Morris, D. R. M. Leask, C. S. McGaughey, G. P. McHugh, K. W. Wright, W. K. Murphy.

Mr. Samuel Clement Smoke, K.C., of the firm of Watson, Smoke, Chisholm & Smith, 20 King street east, died of heart failure at his residence, 17 Chestnut Park, after but one day's illness.

Mr. Smoke was in his sixty-first year, and was born in South Dumfries, near Paris, and leaves a widow and one son, who is attending the University of Toronto.

Judge M. A. McHugh, Senior Judge of the County of Essex, and one of Windsor's most highly respected citizens, died suddenly at his home in Windsor from an attack of stomach trouble.

ANNUAL MEETING OF THE AMERICAN BAR ASSOCIATION.

The preliminary programme for the annual meeting of the American Bar Association to be held in Montreal on Monday, Tuesday and Wednesday, September 1st, 2nd and 3rd, is announced.

This will be the first occasion on which the convention of this Association has been held outside the United States, and great importance is attached to the fact. The guests of

honour will include the Rt. Hon. Viscount Haldane, Lord High Chancellor of Great Britain; W. H. Taft, former President of the United States, and Maitre Labori, Batonnier of the Bar of Paris, France, famed for his defence of Captain Dreyfus and Emile Zola. Lord Haldane will arrive in Montreal on Sunday, August 31st, and will dine privately that evening with Frank B. Kellogg.

The first session of the convention will be held at 10 a.m., on Monday, September 1st, in the Assembly Hall of the Royal Victoria College, when Mr. Kellogg will deliver the opening address. At 3 o'clock the same afternoon Lord Haldane will deliver the annual address before the Association at the Princess Theatre, being introduced by the Hon. Edward Douglas White, Chief Justice of the Supreme Court of the United States, who will preside. In the evening Lord Haldane will dine with the Hon. C. J. Doherty at the Ritz-Carlton Hotel, and later the Minister of Justice will, on behalf of the Dominion Government and the Bench and Bar of Canada, tender a reception to the Lord Chancellor and the President and members of the Association at the Art Association Galleries.

On Tuesday morning the Session will be devoted to the reports of standing and special committees, which will be distributed in advance of the meeting. On Tuesday evening there will be a symposium on "The Struggle for the Simplification of Legal Procedure," discussed under three sub-topics, as follows: "Some Causes," by Hon. W. C. Cook, Judge of the Federal Circuit Court of Appeals, Kansas; "Legal Procedure and Social Unrest," by the Hon. Charles Burke, Judge of the Maryland Court of Appeals; "The Goal and Its Attainment," by the Hon. Wm. A. Blount, of Florida. On Wednesday morning Mr. Taft will present a paper on a topic to be announced later. The Tuesday and Wednesday Sessions will be held at Royal Victoria College.

The annual banquet will be given on Wednesday evening at the Windsor Hotel, the Hon. Elihu Root, Senator from New York, will preside, and Maitre Labori will respond to one of the toasts.

The headquarters of the convention will be at the Windsor Hotel. In connection with the convention, the following meetings of committees or affiliated bodies will be held: Committee on Uniform Judicial Procedure, 8 p.m., Saturday, August 30th, Windsor Hotel.

Executive Committee, 8 p.m., Saturday, August 30th, Mr. Kellogg's private reception room, Ritz-Carlton Hotel.

Commissioners on Uniform State Laws, 10 a.m., Tuesday, August 26th, Windsor Hotel.

Association of American Law Schools, 3 p.m., September 2nd, Windsor Hotel.

Comparative Law Bureau, 3 p.m., Tuesday, September 2nd, Windsor Hotel.

American Institute of Criminal Law and Criminology, 2.30 p.m., Wednesday, September 3rd, Windsor Hotel.

The programmes for the meetings of the Section of Legal Education and the Section of Patent Law will be announced later.

THE HISTORY AND DEVELOPMENT OF THE MOTION FOR NEW TRIAL AND IN ARREST OF JUDGMENT.

The motion for new trial and in arrest of judgment are so closely allied in the practice in the Courts to-day that a discussion of both is necessary where either is considered, and they will both be discussed herein, but in different parts. The first part will be devoted to a consideration of the practice of suspending judgments, which is accomplished by the motion for new trial; and the second part will be devoted to the matter of arresting judgments, which is accomplished by the motion in arrest of judgment.

MOTION FOR NEW TRIAL.

A new trial is defined to be "a re-examination of an issue of fact before a Court and a jury, which had been tried at least once before the same Court."¹ Another authority has defined it as "a rehearing of the legal rights of the parties upon disputed facts, before another jury, granted by the Court on motion of the party dissatisfied with the result of the previous trial, upon a proper case being presented for the purpose."²

¹ Hill. N. Tr. 1; Bouvier L. Dict.; Wharton's L. Dict.

² Chitty Gen. Pr. 30; Grah. & W. N. Tr. 32.

The origin of the practice of the motion for a new trial is extremely ancient and is so obscure that it is described by many writers as "concealed in the night of time."³ It is an open question as to just when the practice did arise, and a question upon which the writers of legal history disagree.

Chief Justice Willes in 1744⁴ attempted to draw a distinction between a *venire facias de novo* and a *venire de novo*. He said, The *venire facias de novo* is as old as the common law when attaints were in use; the *venire de novo* is only a *new invention*." Whether there was such a distinction between them then we cannot tell, but certain it is that no such distinction exists at the present time. The terms "*venire facias de novo*" and "*venire de novo*" are now used interchangeably to denote a new trial.

It may be that Justice Willes was mistaken in his distinction and that what he thought was a "new invention" was only an evolution in the method of procuring a new trial. It is certain that the practice could not have sprung into existence fully developed like Minerva from the brain of Jupiter. It was a radical change in the system of procedure in the Courts in which the decisions were based upon precedents, and in which no custom became law until it had been used for such a length of time that "the memory of man runneth not to the contrary."

Justice Willes goes on to say: "The *venire facias de novo* was granted for only two matters and they must appear upon the record. They were: first, if it appear upon the fact of the verdict, that the verdict is so imperfect that no judgment can be rendered upon it; second, where it appears that the jury ought to have found other facts differently."⁵ It is now well established that a new trial will be granted on either of the two grounds: (a) verdict so imperfect that no judgment can be rendered upon it;⁶ (b) where it appears other facts ought to have been found differently.⁷

If Justice Willes was right in his technical distinction between *venire facias de novo* and *venire de novo* when he said in the year 1744 that the new trial, or *venire de novo* as he put it, was a "new invention," then it must appear that

³ Bouvier's Law Dictionary.

⁴ *Witham v. Lewis*, 1 Wils. 48.

⁵ *Witham v. Lewis*, 1 Wils. 48.

⁶ *Abbott v. Roach*, 113 Ga. 511.

⁷ *Clark v. Jenkins*, 162 Mass. 397.

the grounds for which a *venire facias de novo* would issue were the same for which a new trial will be granted to-day. If wrong in his technical distinction, then it must appear that the *venire de novo*, or new trial, he spoke of as a "new invention," was the result of an evolution in the original methods, and was of more ancient origin than he thought. It is evident that Justice Willes made a distinction without a difference and that the *venire de novo* was merely an offshoot from the *venire facias de novo*.

The known facts—meagre as they are—stand out clearly contra to the opinion of Willes that the new trial was "new" at that time, because as early as the year 1351, in the reign of Edward III., we find an instance of judgment being stayed and a *venire de novo* being awarded (after trial at bar) for misbehaviour of the jury.⁸ In the year 1410, in the reign of Henry IV., is another instance of the Court awarding a *venire de novo* (after trial at bar), on account of the prevailing party tampering with the jury.⁹

A period of about two hundred and fifty years follows during which the records of the Courts of England are devoid of any mention of the practice of the Court with respect to granting new trials.

The first reported case where a new trial was granted upon its merits, was in a case of slander after trial at bar, in 1655,¹⁰ when Chief Justice Glynn grounded the first precedent for granting a new trial on account of excessive damages given by the jury; "apprehending with reason, that notorious partiality in the jurors was a principal species of misbehaviour."¹¹

It would seem then that the history of the practice of granting new trials upon the merits is traceable to the beginning of the seventeenth century, if we are to rely on that case. But Lord Mansfield, one of the most learned men of the legal profession in all the history of the common law, was of the opinion that new trials had been granted for matters extrinsic, or *dehors*, the record long prior to 1655. In the year 1757, in handing down an opinion and in commenting on the view that the first new trial was granted in 1655, he said: "It is not true that new trials were not granted before 1655. The reason why this matter cannot

⁸ 3 Bl. Com. 387.

⁹ 3 Bl. Com. 387.

¹⁰ *Wood v. Gunston*, Style 466.

¹¹ 3 Bl. Com. 388.

be traced further back is that the old report books do not give any accounts of determinations made by the Court upon motions."¹²

Lord Mansfield's view seems to be the correct one and Justice Willes' view the wrong one since we have the few instances of the granting of new trials, reported in the Year Books of Edward III., Henry IV. and Henry VII. Another point which will strengthen Lord Mansfield's contention is the statement by Chief Justice Rolle in 1648¹³ that a practice had grown up and had been in use for several years in the Court of Common Pleas of granting new trials upon the mere certificate of the Judge that the verdict had passed against his opinion, unfortified by any report of the evidence. In commenting upon the action of Rolle, C.J., in refusing to grant the new trial under the circumstances, Blackstone says: "Though Chief Justice Rolle (who allowed of new trials in case of misbehaviour, surprise, or fraud, or if the verdict was notoriously contrary to the evidence) refused to adopt that practice in the Court of King's Bench." And further commenting upon this case decided in 1648, he says: "*And at that time it was clearly held for law, that whatever was of force to avoid the verdict, ought to be returned upon the *postea*, and not merely surmised to the Court.*"¹⁴

This would indicate that in 1648 the practice of granting new trials was pretty firmly engrafted onto the body of the common law. If the practice was so firmly engrafted that "it was clearly held for law," then the conclusion inevitably follows that in 1648 the new trial was by no means a new thing, for it was not the custom of the Courts of common law to seize upon some new idea and by one decision firmly settle it as law. Rather they were slow to use new things, and then only when necessity demanded it. Before any practice could be said to have been "clearly held for law" it must have been used so long that living memory could not reach back to its beginning.¹⁵

If the record was regular on its face, it is clear that before the origin of the practice of granting new trials the losing party could not get a new trial; no matter how irregular the trial was, or how much error was committed, or how

¹² *Bright v. Eynon*, 1 Bur. 390.

¹³ *Slade Case*, Style 138.

¹⁴ Bl. Com. 388.

¹⁵ 1 Bl. Com. (Chittys) 44.

much the jury misbehaved—the losing party was bound by the trial.¹⁶ The only thing he could do was to sue the jury for bringing in a false verdict, and in certain actions he was even deprived of the right to sue the jury.¹⁷ This action against the jury was called the writ of attain, and consisted of a jury of twenty-four men trying the jury of twelve. The only way in which the losing party could get redress was to get a conviction of the jury of twelve men by the jury of twenty-four. It was pretty difficult to get a reversal of the verdict handed down by the jury of twelve men, and if the plaintiff, or losing party, did succeed in his writ of attain and got a conviction of the twelve-man jury the penalty imposed upon them was extremely severe. Their goods and lands were forfeited, and they and their families were driven from their homes and outlawed.¹⁸

The Judges saw that great injustice was often done, for as long as a man was compelled to convict the jury which tried his case, it was certain that he would very often fail to get justice done to him, for the jury of twenty-four were very loath to convict the jury of twelve. In most cases there would be a greater hardship worked in allowing the plaintiff to recover in his writ of attain, than in affirming the verdict of the first jury and thus letting the hardship fall upon the plaintiff.

Finally, the Judges hit upon the plan of granting a new, or second trial.¹⁹ This was a reasonable and natural way to secure justice, for the parties could now watch their errors; the Judge or jury were better informed, and justice would more probably be done than in the first trial.²⁰

At first the Courts were very strict about granting new trials and the matter sufficient to avoid the verdict had to appear upon the *postea*.²¹ Then, early in the reign of Charles the Second, new trials were granted upon affidavits;²² and the former strictness of the Courts of law, with respect to granting new trials, compelled many parties to go into the Courts of equity to get relief from oppressive verdicts.²³ The law Courts then became more liberal

¹⁶ *Witham v. Lewis*, 1 Wils. 48.

¹⁷ 3 Bl. Com. 403.

¹⁸ 3 Bl. Com. 403.

¹⁹ *Witham v. Lewis*, 1 Wils. 48.

²⁰ Bl. Com. (Chases) 805.

²¹ *Slades Case*, Style

²² *Goodman v. Cothe*

²³ *Bright v. Eynon*,

in granting new trials, with a view to secure justice to the parties.²⁴ The maxim of the Courts of law in the time of Blackstone was: "Where justice is not done upon one trial, the injured party is entitled to another."²⁵

When the Courts of law first began to develop the practice of granting new trials upon motion, they would not grant new trials after a non suit, or trial at bar, or two concurring verdicts, or in a suit in ejectment, or in a suit for slander or libel, or for perjury, nor would a new trial be granted in an inferior Court.²⁶ Later, these distinctions were done away with and a new trial can be had in those, as well as in other cases, where it will best secure the ends of justice.²⁷

It was settled as early as the year 1757 that the power to grant new trials was lodged in the discretion of the Court to grant or refuse it as the exigencies of each particular case should demand.²⁸ The Courts at the present time adhere to the rule that the power is discretionary,²⁹ and this discretion is generally not reviewable by the appellate Court,³⁰ unless it appears on appeal that the trial Court abused its discretionary power in an arbitrary and wrongful manner.³¹

It was also settled at an early period that the object of granting new trials was to do substantial justice,³² and where justice had been done in the trial the Court would refuse to grant a new trial.³³

In the year 1773³⁴ we find Lord Mansfield refusing to grant a new trial where it appeared that the jury had found against the evidence, but as in this particular case the damages would have been only a few pence it would be absurd to send the case back for a new trial. He was merely carrying out his dicta in the earlier case³⁵ "that the discretion must be exercised so as to secure substantial justice." That is law at the present time and a new trial will not be

²⁴ *Bright v. Eynon*, 1 Bur. 390.

²⁵ 3 Bl. Com. 388.

²⁶ 5 Com. Dig. Pleader R. 17.

²⁷ 2 Tidds Pr. 905.

²⁸ *Bright v. Eynon*, 1 Bur. 390.

²⁹ *McLanahan v. Ins. Co.*, 26 U. S. 170.

³⁰ *Farrar v. Electric R. Co.*, 63 S. W. (Mo.) 115.

³¹ *Cook v. Ry. Co.*, 56 Mo. 380; *Rodon v. Transit Co.*, 207 Mo. 392.

³² *Bright v. Tynon*, 1 Bur. 390; *Platt v. Munroe*, 34 Barb. 292.

³³ *Marsh v. Bower*, 2 W. Bl. 851.

³⁴ *Marsh v. Bower*, 2 W. Bl. 851.

³⁵ *Bright v. Eynon*, 1 Bur. 390.

granted where justice has been done by the verdict.³⁶ And this is so even if the correctness of rulings of law be doubtful.³⁷

The power of granting new trials is inherent in all Courts of common law jurisdiction,³⁸ and statutory limitations only regulate, they are not a grant of the power but limitations upon the existing power.³⁹

In the United States, in the majority of the states, the practice pertaining to the motion for a new trial is generally regulated by statute,⁴⁰ but the statutory enumeration of cases in which a new trial shall be granted does not exclude all other cases, or deprive the Court of its common law power, in order to secure substantial justice, to grant new trials for other good and sufficient reasons, though falling short of statutory grounds.⁴¹

The motion for new trial is governed by the same rules in both criminal and civil cases,⁴² but generally the Courts appear more lenient in the former class of cases.

The motion for new trial is connected directly with the judgment and is not a collateral motion.⁴³ The office of the motion is to direct the attention of the trial Court to the specific errors committed on the trial,⁴⁴ in order to make such irregularities, which would not otherwise appear,⁴⁵ a part of the record.⁴⁶ Where no motion for a new trial is made in the trial Court to correct such errors, the weight of decisions hold that they are deemed to have been waived and the appellate Courts will refuse to review them.⁴⁷ At common law a motion for new trial was never necessary in order to get appellate review. A writ of error brought up the exceptions. Thus, the use of the motion to preserve

³⁶ *Green v. Cock*, 39 Ga. 339; *Haber v. Lane*, 45 Miss. 608; *Ford v. U. S.* 18, C. Ct. 62.

³⁷ *Breckenridge v. Anderson*, 26 Ky. 710.

³⁸ *Zaleski v. Cook*, 45 Conn. 401.

³⁹ *Bartley v. Jamison*, 44 Mo. 141; *McNamara v. R. R.*, 12 Minn. 388.

⁴⁰ In Mo. see Sec. 2202, *et seq.*, R. S. Mo. 1909.

⁴¹ *Fine v. Rogers*, 15 Mo. 215; *Brenzinger v. Bank*, 19 Ohio Cir. Ct. R. 36.

⁴² *Grayson v. Conn.*, 6 Gratt. 712, 723; Hill. N. Tr. (2 ed.) 114.

⁴³ *R. R. v. Doane*, 105 Ind. 92.

⁴⁴ *Rohrer v. Brockhage*, 15 Mo. App. 16.

⁴⁵ *McAllister v. Ins. Co.*, 78 Ky. 531.

⁴⁶ *Werner v. State*, 44 Ark. 127.

⁴⁷ *McClurkern v. Ewing*, 42 Ill. 283; *McGee v. Robbins*, 58 Ind. 463; *State v. Fargo*, 151 Mo. 280; *Sikes v. Norman*, 122 Ga. 387.

exceptions has been the principal development of the motion for new trial.

The motion in arrest of judgment cannot take the place of nor perform the offices of the motion for new trial,⁴⁸ and although there is a conflict of authority as to whether moving in arrest before moving for new trial waives the latter,⁴⁹ the weight of authority seems to be that it does waive the right to the motion for a new trial.⁵⁰

Blackstone enumerates the grounds for granting new trials, arising from matter extrinsic the record, as: "Want of notice of trial; flagrant misbehavior of the prevailing party towards the jury, which may have influenced the verdict; gross misbehavior of the jury among themselves; verdict contrary to evidence or without evidence; exorbitant damages; misdirection of the jury, so that they have found an unjustifiable verdict; for these, and other reasons of the like kind, it is the practice of the Court to award a second, or new, trial."⁵¹

New trials are granted for matter arising extrinsic, or *dehors*, the record;⁵² but here it might well be mentioned that if the error is harmless the Court will not grant the motion.⁵³

The grounds for granting new trials are, generally speaking, errors of Judge in matters of law, and errors of the jury in matters of fact.⁵⁴ The more specific grounds for which the Courts have entertained and granted the motion for new trial are: Admission of improper evidence;⁵⁵ exclusion of proper evidence;⁵⁶ improper nonsuit or dismissal of action;⁵⁷ giving improper instructions;⁵⁸ refusing proper instructions;⁵⁹ misconduct of parties and counsel;⁶⁰ and the misconduct of the prevailing party as ground for a new trial is not confined to something occurring at the

⁴⁸ *McClerkin v. State*, 20 Fla. 879.

⁴⁹ *Pope v. Latham*, 1 Ark. 63.

⁵⁰ *Freeman v. R. R.*, 107 Tenn. 340; *Eckert v. Brinkley*, 134 Ind. 614; *McReynolds v. Anderson*, 56 Mo. App. 398.

⁵¹ 3 Bl. Com. 387.

⁵² *Bowie v. State*, 19 Ga. 1.

⁵³ *Brazier v. Clapp*, 5 Mass. 10; Hill. N. Tr. 32.

⁵⁴ Hill. N. Tr. 15.

⁵⁵ *Bush v. Sprague*, 51 Mich. 41.

⁵⁶ *Moreland v. McDermot*, 10 Mo. 605.

⁵⁷ *Beals v. Cleveland*, 153 Fed. 211.

⁵⁸ *Eldridge v. Hawley*, 115 Mass. 510.

⁵⁹ *Dale v. Thurlow*, 12 Metc. 157.

⁶⁰ *McIntyre v. Hussey*, 57 Me. 403.

trial;⁶¹ misconduct of witnesses;⁶² misconduct of jurors;⁶³ irregularities and defects in verdicts and findings;⁶⁴ verdict or decision contrary to law,⁶⁵ or contrary to instructions;⁶⁶ verdict contrary to, or not sustained by evidence;⁶⁷ excessive damages;⁶⁸ inadequate damages;⁶⁹ surprise by want of notice of trial;⁷⁰ absence of a material witness where party is free from fault;⁷¹ newly discovered evidence, which could not have been found by the use of reasonable diligence.⁷² It is also laid down that when the jury have misunderstood or disregarded the evidence or instructions, or have neglected to consider the facts properly, or have overlooked prominent and essential points in them, and have failed to do substantial justice, the verdict must be set aside and a new trial granted.⁷³

The grounds for granting new trials are not limited to these alone, but whenever it appears to the Court that it is necessary in order to secure justice to the party, of which otherwise he might be deprived by reason of some error not appearing on the face of the record, but which occurred in the trial of the case, the Court will grant a new trial.

In order to avail himself of any of these grounds the party must object at the time the error is made.⁷⁴

At common law there was no absolute rule as to the number of new trials that might be granted in a case.⁷⁵ Where this is not regulated by statute more than one new trial may still be granted. The reason for granting more than one new trial, in such a case, should rest in the discretion of the trial Court.⁷⁶ There are two general grounds for which

⁶¹ 29 Cyc. 773.

⁶² *Cow v. Tomlin*, 19 N. J. L. 76.

⁶³ *Rogers v. R. R.*, 67 Cal. 607; *Baker v. Jacobs*, 64 Vt. 197.

⁶⁴ *Hitchcock v. Haight*, 7 Ill. 604; *Guerin v. Smith*, 62 Mich.

369. ⁶⁵ *Bryant v. Ins. Co.*, 13 Pick. 543.

⁶⁶ *Peterson v. Patrick*, 126 Mass. 395.

⁶⁷ *Clark v. Jenkins*, 162 Mass. 397; *Turner v. Turner*, 85 Tenn.

387. ⁶⁸ *Black v. Drake*, 2 Colo. 330; *Morrell v. Lawrence*, 203 Mo.

363. ⁶⁹ *Benton v. Collins*, 125 N. C. 83.

⁷⁰ *Galvin v. Dailey*, 109 Iowa 332.

⁷¹ *Sherrod v. Olden*, 6 N. J. L. 344.

⁷² *Moore v. Coates*, 35 Ohio St. 177.

⁷³ *Higgins v. Lee*, 16 Ill. 495; *Hill. N. Tr.* 99.

⁷⁴ *Wait v. Maxwell*, 22 Mass. 217; *Russell v. Ins. Co.*, Fed. Cases No. 12, 147; *Jackson v. Jackson*, 5 Cow. (N. Y.) 173.

⁷⁵ *Taylor v. R. R.*, 79 Ga. 330; *Clark v. Jenkins*, 162 Mass.

397. ⁷⁶ *Harwell v. Foster*, 97 Ga. 264.

more than one new trial is usually granted: (a) The ground that the verdict is contrary to the instructions of the Court;⁷⁷ or (b) the ground that there is no legal evidence to prove some material fact in issue.⁷⁸ The Missouri statute⁷⁹ provides that there shall be only one new trial in any case, except, "(a) where the triers of fact shall have erred in a matter of law; (b) when the jury shall be guilty of a misbehavior."

Where not required by statute or by rule of Court the motion may be made orally in open Court.⁸⁰

The effect of the motion for a new trial is to suspend judgment, and when the actual new trial is granted the former trial is of no further effect, the verdict is wiped out, and no judgment can be rendered upon it.⁸¹

The result of this is "a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before."⁸²

Whatever was the origin of the motion for new trial, and no matter how slow the Courts of early common law were to adopt it, it is now well agreed upon by the authorities⁸³ that the greatest of all our civil institutions, the trial by jury, could not now subsist without a power lodged somewhere to grant new trials.

MOTION IN ARREST OF JUDGMENT.

Arrest of judgment is defined as follows: "The act of a Court by which the Judge refuses to give judgment because upon the face of the record it appears that the plaintiff is not entitled to it."⁸⁴ "At common law the arrest of judgment is a withholding or staying of judgment, notwithstanding a verdict, on the ground that there is some error appearing on the face of the record which vitiates the proceedings."⁸⁵ Another and still later authority defines it as follows: "Arrest of judgment is the method by which the Court or Judge refuses to give judgment in a cause,

⁷⁷ *Wilkie v. Roosevelt*, 2 Am. Dec. 149; *Davis v. Roper*, 2 Jur. N. S. 167.

⁷⁸ *Bryant v. Ins. Co.*, 13 Pick. 543; *Wood v. Lane*, 102 Ga. 199.

⁷⁹ Sec. 2203 R. S. Mo. 1900.

⁸⁰ *R. R. v. White*, 166 Ill. 375.

⁸¹ Hill. N. Tr. 59.

⁸² Bl. Com. (Chases) 805.

⁸³ *Bright v. Eynon*, 1 Bur. 390; 2 Tidds. Pr. 905.

⁸⁴ Bouvier L. Dict.

⁸⁵ 23 Cyc. 824.

though it be regularly decided, where it appears either that no cause of action exists, that the cause of action is not set forth with precision or accuracy, or that it appears from the record that if judgment were rendered in favor of the prevailing party it would be erroneous or reversible."⁸⁶

The origin of the practice of arresting judgment is apparently as old as the reported cases of the English common law. There are cases cited in the Year Books in the reign of Henry IV. in 1411 and in the reign of Henry VII. in 1490 in which judgments were arrested. It would seem that it was a settled practice at the time of the case in the Year Book of 1411,⁸⁷ although there are no cases reported prior to that time where the matter of arresting judgment was involved.

In the early development of the practice of arresting judgments, the method was different from that which is in use to-day. After the trial and before judgment the defendant would have his day in Court and would assign his exceptions in arrest of judgment by way of a plea; this they called "pleading in arrest of judgment."⁸⁸ What they called moving in arrest was where the party was not in Court and in that case it was moved by one as *amicus curiae*.⁸⁹

In the year 1705 we find the Court of King's Bench laying down the rule that one should move in arrest of judgment, although prior to that they had pleaded in arrest of judgment.⁹⁰

In the year 1700 we find Lord Holt holding that arrest of judgment might be had for either matter intrinsic, i.e., such as appears on the face of the record itself, or extrinsic matter, i.e., "some foreign matter suggested to the Court which proves the writ is abated, for it is not enough that it proves the writ is only abatable."⁹¹ From a previous decision it appears that Lord Holt was wrong in holding that arrest of judgment could be based on any extrinsic matter at all, for in 1698 it had been held that judgment could only be arrested for what appeared on the record itself.⁹² In the year 1705 it was again held that the matter must be appar-

⁸⁶ Standard Encyc. Procedure,—Arrest.

⁸⁷ Anon. 1 Salk 77.

⁸⁸ Anon. 1 Salk 77; 2 Tidds Pr. 915.

⁸⁹ Anon. 1 Salk 77; *Smith v. Harmon*, 1 Salk 315.

⁹⁰ *Smith v. Harmon*, 1 Salk 315.

⁹¹ Anon. 1 Salk 77.

⁹² *Peachey v. Harrison*, 1 Ld. Raym. 232.

ent in the record, and not extrinsic.⁹³ At the present date it is absolutely necessary in both criminal and civil cases that the matter on which judgment is sought to be arrested, must appear on the face of the record.⁹⁴

It is an inherent right in a Court of common law jurisdiction to arrest its judgment.⁹⁵ And it is not restricted to waiting until the party moves in arrest, but it may exercise the right to arrest on its own motion, where proper grounds exist.⁹⁶

Prior to the statute of 27 Elizabeth, anything that was the subject of a demurrer, whether a defect of form or of substance, could be taken advantage of one motion in arrest of judgment. But the statute of 27 Eliz. ch. 5, sec. 1, which required special demurrers as to defects of form, provided in effect, that defects of form were waived unless specially demurred to, and the usefulness of the motion in arrest was greatly impaired. It was no longer possible to wait until the verdict had been brought in and then to come in and arrest judgment for some mere defect of form, for all defects of form were then waived. So, all that the arrest of judgment could accomplish was to go to the substantial defects. This same result could be obtained by the use of a writ of error and as a writ of error caused a longer delay this was the course usually followed since delay is what a losing defendant wants.

The motion in arrest does not accomplish any more in regard to defects in the pleading than a general demurrer would, and there are instances where the general demurrer will reach certain defects which are waived by pleading over and cannot be reached by motion in arrest; such for instance as a departure, or a premature issue, are both waived by pleading over.

There is one instance where a motion in arrest of judgment is necessary, and that is where the verdict is defective in form.⁹⁷ As this is a defect in form it will be waived unless objection is made thereto at the time, and the only way that it can be objected to is by arrest in judgment. If the verdict is bad in substance it can be reached either by motion in arrest, ⁹⁸ or by writ of error. But if it is bad

⁹³ *Smith v. Harmon*, 1 Salk 315.

⁹⁴ *Lee v. Brown*, 5 Wend. 221; *Bond v. Dustin*, 112 U. S. 604.

⁹⁵ *Wentworth v. Wentworth*, 2 Minn. 238.

⁹⁶ *Bright v. State*, 90 Ind. 343.

⁹⁷ *Bassett v. Davis*, 2 Root 204.

⁹⁸ *Finney v. State*, 9 Mo. 632.

in form it must be reached by motion in arrest or the defect is waived.

It would seem then that the only case in which there is anything for which the motion in arrest is especially applicable, is the case where there is a defect in form in the verdict of the jury. In all other cases there is nothing to be gained by it which could not be secured by the writ of error after judgment, or by a general demurrer before trial.

In filing the motion in arrest care has to be taken that it is not filed before the motion for a new trial, for although there is a conflict, by the weight of authority, the motion for new trial is waived by first filing the motion in arrest.⁹⁹

As stated above ¹⁰⁰ the defect must appear on the face of the record, and must not appear to have been waived by the defendant.¹⁰¹ Moreover, the record must be the one before the Court in which the arrest of judgment is sought.¹⁰²

Judgment will be arrested where the record is so deficient that it is not amendable,¹⁰³ as for instance, matter that affects the jurisdiction of the Court.¹⁰⁴ In general, the rule now in civil actions is not to arrest judgment for any cause other than the want of jurisdiction.¹⁰⁵

A fatal defect in the writ or process by which the suit is begun may be taken advantage of by motion in arrest,¹⁰⁶ but it must be a "fatal" defect.¹⁰⁷

Judgment will be arrested if plaintiffs' declaration omits essential facts, or if the pleadings will not support a judgment in his favor.¹⁰⁸ Judgment will be arrested where a verdict is bad in substance,¹⁰⁹ or bad in form,¹¹⁰ or where the jury based their verdict on hazard or chance;¹¹¹ or for a misjoinder of causes of action.¹¹²

⁹⁹ *Hall v. State*, 110 Tenn. 365.

¹⁰⁰ *Lee v. Brown*, 5 Wend. 221.

¹⁰¹ *Auld v. Butcher*, 2 Kan. 130.

¹⁰² *Peachey v. Harrison*, 1 Salk 77.

¹⁰³ *Livingston v. Rogers*, 1 Caines 583.

¹⁰⁴ *Com. v. Fay*, 151 Mass. 380.

¹⁰⁵ *R. R. Co. v. Adams Exp. Co.*, 130 S. W. (Mo.) 101.

¹⁰⁶ 23 Cyc. 825; *Neal v. Gordon*, 60 Ga. 112.

¹⁰⁷ *Foot v. Knowles*, 4 Metc. 386.

¹⁰⁸ *Jaccard v. Anderson*, 32 Mo. 188.

¹⁰⁹ *Finney v. State*, 9 Mo. 632.

¹¹⁰ *Miller v. Gable*, 30 Ill. App. 578.

¹¹¹ *Warner v. Robinson*, 1 Root 194.

¹¹² *Sellick v. Hall*, 47 Conn. 260.

In criminal cases it is ground for arrest: that the Court has no jurisdiction of the parties;¹¹³ that the offence was not committed in the jurisdiction;¹¹⁴ that there is an omission of a penalty in the statute;¹¹⁵ that the prosecution was barred by the Statute of Limitations;¹¹⁶ that the statute has been repealed;¹¹⁷ that the statute is unconstitutional;¹¹⁸ that there is a lack of venue in the Court;¹¹⁹ or, that there was a failure to arraign and plead.¹²⁰

Judgment will not be arrested for any defect in the pleadings which would not have been fatal on demurrer,¹²¹ and greater strictness is observed in construing a motion in arrest than a demurrer,¹²² the motion being denied if the issue joined be such that the Court can presume that the defects or omissions were supplied by proof at the trial.¹²³

Matter objected to by demurrer and decided upon cannot afterward be urged in arrest of judgment.¹²⁴

If the defect is formal and amendable then it cannot be reached by motion in arrest of judgment.¹²⁵

Generally speaking, a judgment will not be arrested on account of any matter which might have been pleaded and relied on as a defence to the action, whether by plea in bar¹²⁶ or by plea in abatement.¹²⁷

Nor is it any ground for motion in arrest that there was error in the admission of evidence at the trial,¹²⁸ or that the evidence was insufficient to sustain the verdict.¹²⁹ And as a general rule judgment cannot be arrested if it appears on the whole record for which party judgment ought to be given.¹³⁰

When the motion in arrest of judgment is granted, it prevents the entry of final judgment in that cause, unless,

¹¹³ *State v. Tulley*, 31 Mont. 365.

¹¹⁴ *Ryan v. Com.* 80 Va. 385.

¹¹⁵ *State v. Main*, 31 Com. 572.

¹¹⁶ *State v. Gibbs*, 1 Root 171.

¹¹⁷ *State v. Nutt*, 61 N. C. 20.

¹¹⁸ *Boswell v. State*, 114 Ga. 40.

¹¹⁹ *Searcy v. State*, 4 Tex. 450.

¹²⁰ *State v. Mikel*, 125 Mo. App. 287.

¹²¹ *Hyer v. Vaughn*, 8 Fla. 647; 23 Cyc. 830.

¹²² *Henry v. Sowles*, 28 Fed. 521.

¹²³ *Higgins v. Bogan*, 4 Harr. 330.

¹²⁴ *Freeman v. Camden*, 7 Mo. 208.

¹²⁵ *Porter v. Kepler*, 14 Ohio 127; *Dean v. Ross*, 178 Mass. 397.

¹²⁶ *McCarty v. O'Bryan*, 137 Mo. 584.

¹²⁷ *Belden v. Curtis*, 48 Conn. 32.

¹²⁸ *Claray v. Brick Co.*, 100 Fed. 915.

¹²⁹ *Powce v. State*, 48 N. J. L. 34.

¹³⁰ 23 Cyc. 824.

of course, the arrest is made conditional upon an amendment or such other action as will remove the cause of arrest.¹²¹ If a new trial is not awarded it operates as a discontinuance and the defendant is dismissed without delay.¹²²

MORRELL DE REIGN.

Benton, Mo

THE LIEN THEORY OF THE MORTGAGE—TWO CRUCIAL PROBLEMS.

In a recent article in this review¹ the writer discussed in a general way the nature of a mortgage of real property in the states which adopt the lien or equitable theory of the mortgage. The conclusion therein arrived at was that, while the mortgage does not convey the legal title to the land until foreclosure, it does convey to the mortgagee, at the time of its execution, a present interest in the land, the general ownership of which remains in the mortgagor—an interest which is limited and special, more analogous to an easement than to general ownership; which is contingent or inchoate, in that default and foreclosure are essential to its ultimate enjoyment; and which is merely collateral to a principal right to receive something of value, but which is a legal interest as distinguished from an equitable interest; a right *in rem* as distinguished from a right *in personam*; a right which, in the terminology of jurisprudence, would be called an “hypothecation.”² This conclusion was arrived at by a course of deductive reasoning. The premises were found in our case law but the conclusion was so remote from the premises that it lacked a convincing foundation of authority. In the present article we will examine two specific problems in mortgage law which offer a test of this conclusion. The discussion will be chiefly confined to the specific problems in hand but

¹²¹ *Johnson v. Johnson*. 30 Colo. 402.

¹²² 23 Cyc. 835.

¹ Vol. 10, pp. 587-607 (June, 1912).

² For a definition of this term and an analysis of the various rights which one may have in land, see Holland, *Jurisprudence* (10th Ed.) pp. 183-225.

the primary purpose will be to get at the underlying theory of the mortgage.

The chief practical difference between a legal interest in land and a merely equitable interest lies in the application of the equitable doctrine of *bona fide* purchase, by which the *bona fide* purchase of a legal interest is a complete defence to the assertion of a prior equitable interest, while between conflicting interests both of which are legal or both of which are equitable the one which is prior in time is preferred. For a test of the question in hand we would, therefore, naturally turn to the case of a mortgage of land followed by a *bona fide* purchase of the legal title from the mortgagor and the case of the creation of an equitable interest followed by a mortgage by the owner of the legal title to a *bona fide* mortgagee. Cases of this sort, however, are almost invariably controlled by the recording acts, which make no distinction between legal and equitable interests, either as to the prior conveyances, on the one hand, which they avoid or postpone, if not recorded, and give constructive notice of, if recorded, or as to the subsequent purchaser, on the other hand, whom they prefer or charge with constructive notice, as the case may be.* To test the theory in question, then, we must eliminate the recording acts, and the problems hereinafter discussed are selected as involving questions of priority between a mortgagee and a subsequent *bona fide* purchaser, on the other hand, or a prior equitable claimant, on the other, which are not controlled by those statutes.

The first of these problems is this: given a mortgage and operating under the lien theory and a subsequent absolute conveyance by the mortgagor, or one deriving title from the mortgagor, to one who gives value and has no notice of the mortgage, neither the mortgage nor the conveyance being recorded, or the mortgage being recorded after the execution of the conveyance but before the recording of the conveyance; and given a recording act of the common form requiring certain conveyances to be recorded and providing that an unrecorded conveyance shall be void as against a subsequent purchaser in good faith . . . whose conveyance shall first be duly recorded;” which party has priority?

* Jones, Mortgages, sec. 476; 13 L. R. A. 236, note.

The recording act is wholly inoperative in this case. It does not avoid the mortgage in favour of the purchaser because the latter's conveyance is not "first duly recorded." The purchaser satisfies the first requirement of the statute, as being a "subsequent purchaser in good faith," but he fails to satisfy the second requirement of the statute, which is conjunctive with the first. The only doubt which can be thrown on this position is engendered by approaching the question from the point of view of constructive notice and insisting that the purchaser does not have constructive notice of the mortgage from the record and therefore takes free from the mortgage. This line of reasoning, supported by dicta of the Court, led to a decision in *Fallis v. Pierce*, 30 Wis. 443, (1872), that on the facts of our problem the purchaser would prevail. This decision was affirmed on rehearing (*Ib.* 450) but on a second rehearing it was reversed and the mortgagee allowed to foreclose (*Ib.* 454-482). Dixon, J., in delivering the final opinion in the case, says: "This . . . condition ('whose conveyance shall first be duly recorded') . . . must be complied with by the subsequent purchaser in good faith and for a valuable consideration, before he can claim the benefit and protection of the statute. Without the deed to such a subsequent purchaser *first upon record*, the title under the prior unregistered deed must still be preferred. . . . Much confusion and uncertainty have been brought into the treatment and discussion of this subject, by the frequent and almost continuous use and recurrence in the opinions of Courts and the works of authors, of the words 'constructive notice.' Those words are not anywhere found in the registry laws, and, although their meaning is in general well understood, yet they are often so employed as to confuse and perplex the reader, rather than to convey an intelligent idea of the precise view which the Court takes of the statute or of the principle or reason which lies at the foundation of the decision. . . . In respect to the deed first executed, and first recorded, the registry law does not break in upon or conflict, but is in entire harmony with the rule of the common law, that he who is first in time is first in right; that an owner, who has once conveyed his estate of title, cannot afterwards convey the same estate or title by the execution of a subsequent deed to another. Independently of the recording act, the prior deed, though unrecorded, has full operation and effect, that is to say, defeats a subsequent

purchase and deed, however truly made, in good faith and without notice."

The same result, so far as concerns the construction of the statute, has been arrived at in other states having this statute without the difficulty encountered in Wisconsin and therefore, of course, without the fullness of explanation found in the foregoing case.⁴

To these authorities, which shew that upon the facts of our problem the *purchaser* cannot claim any benefit under the recording acts, we may add that neither can the *mortgagee* derive any advantage therefrom. On the first of the two alternatives included in the problem, that of neither conveyance being recorded, this is obvious. On the other alternative, that of the mortgage being recorded, after the subsequent conveyance is executed but before it is recorded, it is less obvious but equally true. The statute merely provides that unrecorded conveyances shall be void as against certain subsequent conveyances, and does not provide that recorded conveyances shall be superior to subsequent conveyances. It denies the advantage of the statute to subsequent purchasers whose conveyances are not first recorded, but does not say that all conveyances shall take rank in the order of recordation.⁵ It does not expressly abrogate the equitable doctrine of *bona fide* purchase and only does so by implication in those cases in which it substitutes a different rule of law. Here, again, the only doubt which can be thrown upon the question arises from a misapplication of the doctrine of constructive notice. To the literal import of the statute has been added, by judicial interpretation, the doctrine of constructive notice from the record, which amounts only to this, that a purchaser of land is charged with knowledge of all recorded conveyance in his chain of title, whether he actually has such knowledge or not—in other words that the record of such conveyance is equivalent to actual notice of them and is equally effectual in destroy-

⁴ 24 Am. & Eng. Encyc. 140.

⁵ The statement that conveyances take rank in the order of their recordation is not uncommon in text and opinion. It is usually qualified by some such expression as "in general," but, whether so qualified or not, it must be taken as being but a convenient formula which gives the correct result in the majority of cases. It does not appear to have been applied in any case where the difference between it and the terms of the recording act was material.

The result might be otherwise under such a statute as that in Ohio, which says, "Mortgages * * * shall take effect from the time the same are delivered * * * for record." Gen. Code, sec. 8542.

ing *bona fides*. Constructive notice by the record is not more effective than actual notice for this purpose, and neither destroys *bona fides* if it comes after a purchase is completed by delivery of the conveyance and payment of the consideration.⁶ Aside from the doctrine of constructive notice, thus limited, a subsequent purchaser is not precluded by the recording acts from setting up any rights he may have against a prior conveyance under the equitable doctrine of *bona fide* purchase.

Our problem, then, being unaffected by the recording acts, the rights of the parties must be worked out under the rules of common law and equity. Under those rules, if the mortgagee's interest in the land is merely equitable it will be cut off by a *bona fide* purchase of the legal title, whereas, if it is a legal interest it will be unimpaired by such purchase.

In the case of *Ely v. Schofield*,⁷ decided by the Supreme Court of New York, General Term, in 1861, there was a mortgage executed on March 19th, 1851, and recorded on March 21st of the same year; an assignment of the mortgage by the mortgagee's administrator to the plaintiff, executed on March 2nd, 1855, but never recorded; a release of the mortgage by the administrator, executed April 9th, 1858, and recorded May 4th, 1858, which release was executed by mistake, without payment and without plaintiff's consent; and a conveyance, by one who had acquired the title of the mortgagor (subject it would seem to the plaintiff's rights), of part of the mortgaged land to the defendant, a *bona fide* purchaser, by a deed dated May 15th, 1858, which was never recorded. The plaintiff filed a bill to foreclose the mortgage. The Court held that the discharge of the mortgage had no other effect than to discharge the *record* of the mortgage leaving the plaintiff the holder of an unrecorded

⁶ 23 Am. & Eng. Encyc. 522. Statutes of the form considered in the text, add to the requirement of *bona fide* purchase, the requirement of priority of record, but do not provide that the recording as well as the purchase must be *bona fide*, and no requirement of *bona fide* recording exists, either for the application of the recording acts (*Ely v. Schofield*, 35 Barb. 330), or, still less, for the application of the equitable doctrine of *bona fide* purchase, which the recording acts have not altered except in so far as they have substituted for certain cases a paramount rule of law. In short, the recording of the prior conveyance, after the subsequent conveyance is executed and the consideration paid, but before the subsequent conveyance is recorded, has a purely negative effect, viz., to prevent the subsequent purchaser from taking advantage of the recording acts.

⁷ 35 Barb. 330.

mortgage (a point which seems indisputable) and that the mortgage was superior to the defendant's title through his unrecorded deed, Welles, J., who delivered the opinion saying: "The parties stand upon equal grounds, as far as the record is concerned, and the statute only gives priority to a recorded conveyance; and the mortgage being anterior to the deed must prevail over it."

In the case of *Fallas v. Pierce, supra*, there was a mortgage of land duly recorded on March 28th, 1859; an assignment of the mortgage executed on April 2nd, 1859, but not recorded until June 21st, 1861; a release of the mortgage by the mortgagee on August 10th, 1859, recorded on December 8th, 1860, the mortgagor having knowledge of the assignment when he took the release; a conveyance by the mortgagor to the defendant, a *bona fide* purchaser, executed on September 19th, 1860, but not recorded until January 10th, 1868, after the recording of the assignment hereinbefore referred to. There was also an assignment from the first assignee to the complainant, executed and recorded after the recording of the release but before the recording of the defendant's conveyance, which, we assume, gave the complainant no greater rights than the first assignee had. The complainant filed a bill to foreclose. It having been determined that the defendant could derive no advantage from the recording acts (*ut supra*) the bill was sustained.

In the case of *Fleschner v. Sumpter*,^a decided by the Supreme Court of Oregon, there was a mortgage and a subsequent deed to a *bona fide* purchaser, both instruments being filed for record at the same time but the mortgage being properly acknowledged and entitled to record, while the deed was not. Foreclosure was decreed, the Court saying by Thayer, J.: "The prior recording of the prior conveyance at any time after its execution will give it precedence." This and some other phrases of the opinion suggest that the priority of the prior conveyance which is first recorded is derived from the statute. If the decision is regarded as resting solely on the operation of the recording acts it offers no authority on the problem before us but is merely an authority for an anomalous construction of the Oregon recording act. If the statement that "the prior recording of the prior conveyance . . . will give it pre-

^a12 Ore. 161.

cedence" is taken as meaning that prior recording will preserve the precedence which the prior conveyance already has, from any impeachment by the recording act, then the case is authority for the same proposition as the New York and Wisconsin cases referred to, though less explicit.

In none of these cases was the fundamental question now before us, that is, whether the mortgagee's interest was legal or equitable, discussed. But, bearing in mind that in the New York and Wisconsin cases the Court distinctly recognized the entire inapplicability of the statutes and that in the Wisconsin case it explicitly stated that this left the prior conveyance in the position that it occupied by common law and equity, it is obvious that the question was squarely presented in these cases, and that the alternative of legal lien must have been assumed without debate.

These are the only cases of the sort which the writer has found.⁹ But there are a number of cases involving the same facts except for the subsequent purchaser being himself a mortgagee, which were decided in favour of the first mortgage.¹⁰ These cases might be reconciled with the theory that the lien of the mortgage is equitable, upon the principle that, both interests being equitable, the prior equity must prevail. They were not, however, decided upon that principle but upon the broad principle that the unrecorded mortgage will prevail over subsequent conveyances not first recorded, and in some of them the language of the Court expressly includes subsequent *absolute* conveyances. It would seem unlikely that the Courts would confine the authority of these cases to contests between mortgagees.

The second problem which we will examine is this: given an equitable interest in land, such as a constructive trust or a vendor's lien, which arises by operation of law, and a mortgage by the holder of the legal title to a *bona fide* mortgagee: will the mortgage be superior to such equity?

None of our recording acts affect this case, for they are all alike in requiring certain conveyances and instruments affecting title to be recorded, and providing that instruments not so recorded shall be avoided or postponed as

⁹ See, however, *Reasoner v. Edmundson*, 5 Ind. 393, in accord with the cases cited, discovered since the article went to press.

¹⁰ *Crouse v. Mitchell*, 130 Mich. 347; *Rumery v. Loy*, 61 Neb. 755; *Fort v. Burch*, 5 Denio 187; *Westbrook v. Gleason*, 79 N. Y. 23.

to certain persons, with the addition, in some cases, of a provision that the recording of such instruments shall be constructive notice to certain persons. They do not provide that no interest in land shall be upheld against a *bona fide* purchaser unless evidence of it is recorded. They, therefore, leave untouched all interests in land which do not arise by a conveyance or instrument of the sort of which recording is prescribed by the statute.¹¹ A subsequent purchaser can only prevail over such interests by virtue of the equitable doctrine of *bona fide* purchase.

In *Parker v. Barnsville Savings Bank*,¹² decided by the Supreme Court of Georgia in 1899, plaintiff's husband bought land with funds belonging to her, taking title in his own name, and then executed a mortgage of the land to the defendant who had no notice of the plaintiff's rights. On a bill to enjoin the defendant from foreclosing and for other relief, it was held that the mortgage was superior to the plaintiff's equity. Little, J., delivering the opinion of the Court, said: "Section 3934 of the Civil Code declares that 'A *bona fide* purchaser for value and without notice of an equity, will not be interfered with by a Court of equity' . . . In a word, a *bona fide* purchaser without notice acquires an unqualified legal right and title to the property purchased, and a Court of equity has no jurisdiction to interfere with such vested legal right and title. A mortgagee who in good faith parts with his money, in ignorance that a person other than the holder of the legal title has a secret equity in the mortgaged property, stands precisely in the attitude of a *bona fide* purchaser and is entitled to the same protection. . . . The bank then acquired a legal lien on the property, even though the mortgage may be infected with usury."

¹¹ See *McKamey v. Thorp*, 61 Tex. 648, disclosing a convincing line of cases to the effect that a judgment or attachment creditor, relying on the recording acts, cannot prevail over an equitable estate arising by operation of law, but that a *bona fide* purchaser, relying on equitable doctrines, will prevail. See also, *Hartsock v. Russell*, 52 Md. 619; *School Dist. v. Peterson*, 74 Minn. 122; *Floyd v. Harding*, 28 Gratt. 401. Note that the cases examined in the text ignore the recording acts and apply the equitable doctrine. See, however, *Riley v. Martinelli*, 97 Cal. 580, dictum contra.

Compare the following cases applying the same principle to a title acquired by adverse possession: *Faloon v. Simshauser*, 130 Ill. 649; *Schall v. Williams Valley R. R. Co.*, 35 Pa. St. 191; *McGregor v. Thompson*, 8 Tex. Civ. App. 32.

¹² 107 Ga. 650.

In the case of *Simpson v. Del Hoyo*,¹³ decided by the Court of Appeals of New York in 1883, the same principles were applied in favour of an assignee of a mortgage. A fraudulent grantee of land mortgaged it to one who had notice of the fraud, who in turn assigned the mortgage to a *bona fide* purchaser. In a suit by the assignee to foreclose, the Court held the assignee superior to the rights of the defrauded vendor of the mortgagor. Earl, J., delivering the opinion of the Court, said: "It is a familiar rule of law that a fraudulent purchaser of real or personal property obtains the legal title to the property purchased, and that he may convey a good title to any *bona fide* purchaser from him for value. He may not only convey the property, but he may deal with it as owner, and may mortgage it; and whoever purchases the property or takes a mortgage thereon from him or under him, in good faith, for value, or deals with him in good faith in reference thereto, will be protected against the claims of the defrauded vendor. The real estate may be conveyed, or a mortgage thereon may be assigned to several successive participants in the fraud, or several successive *mala fide* purchasers. But the moment the real estate or the mortgage reaches the hands of a *bona fide* purchaser for value, the rights and equities of the defrauded owners are cut off."

In *Fisk v. Potter*,¹⁴ decided by the same Court in 1865, we find a peculiar application of the same principles. The plaintiff sold land on credit and conveyed it, by a deed not reserving a lien or disclosing that the price was not paid, to a railroad company, which had previously executed a mortgage of all its property, then owned or thereafter to be acquired, to trustees to secure an issue of bonds, neither the trustees nor the purchasers of the bonds having any notice of the grantor's rights until foreclosure was begun. The mortgage was thereafter foreclosed (the plaintiff not being made a party) and the land in question sold to the defendant, who had notice of the plaintiff's claim before

¹³ 94 N. Y. 189. The Courts below decided against the assignee on the ground that he was an assignee of a non-negotiable chose in action and therefore stood in the shoes of his assignor. The Court of Appeals held this principle inapplicable as between the assignee and a claimant of the land adverse to the mortgage. For a discussion of the dual nature of a mortgage as a chose in action, considered internally, and an interest in land, considered externally, see 10 Mich. L. Rev. 606-7.

¹⁴ 2 Keyes 64.

he completed his purchase and who, therefore, depended for priority upon priority in the mortgagees. On a bill by the grantor to enforce a lien on the land it was held that the mortgage was superior to this lien. Potter, J., delivering the opinion of the Court, after disposing of a question of waiver adversely to the plaintiff, proceeded as follows: "But I am not willing to decide this case alone upon the ground I have been considering, as it was not the ground taken by the Referee who decided the case; and, suppose I am in error in the view I have taken, then,—The legal title of the land in question, upon which plaintiff's conveyance was made to the railroad company, vested in the latter. At the same instant, the lien of the mortgage which had before that been given by the railroad company, and which, before that time, remained but an equitable claim upon '*rights to be acquired*,' according to the case of *Seymour v. The Canandaigua and Niagara Falls Railroad Company* (25 Barb. 308),¹⁵ became a vested *legal* right upon the premises in question. Assuming, now, for the purpose of the argument, the position urged by the plaintiff, that he did not intend to waive his equitable lien for the purchase-money, all he can then claim is, that his equitable lien attached at the same instant of time with the mortgage lien. . . . The learned Referee assumes, in his decision, that both these liens were mere equitable ones. I think this was not so as regards the mortgage. This mortgage was executed in pursuance of an express provision of a statute of the State. It therefore became a legal mortgage, created for a legal purpose, and its lien must have been a legal lien upon all the premises it covered. . . . Upon the question of the superiority of liens, between such as are called *legal* and those which are called *equitable*, it is a maxim, coeval with the law of equity, that 'where equities are equal the law must prevail.' In Hargrave and Butler's notes to Coke upon Littleton, 290 b, the rule is thus laid down: 'If a person has the *legal* estate or interest in the subject-matter in contest, he must, neces-

¹⁵ The case cited proceeds distinctly on the theory that, while in general a mortgage of land to be acquired creates but an equitable lien on such land, when it is acquired, by reason of the rule of law that one cannot grant what he does not own, yet, in the case of a railroad company which has a franchise authorizing it to acquire the land necessary for its purposes and which mortgages its franchise, the after acquired land stands on the same footing at law as the land owned at the time of the mortgage and is subject to the lien of the mortgage.

sarily, prevail at law over him whose right is only *equitable*, and not, therefore, even noticed by the Courts of law. This advantage he carries with him so far, even into a Court of equity, that, if the equitable claims of the parties are of equal force equity will leave him who has the *legal* right in full possession of it, and will not do anything to reduce him to an equality to the other, who has the equitable right only.”

This decision would seem questionable. Granting that the lien of the mortgage is a legal lien, the mortgagees do not appear to have advanced their money upon the faith of this specific property, and, under these circumstances, they would not seem to satisfy the requirements of the equitable doctrine of *bona fide* purchase, as generally understood and as stated in this very opinion, viz.. “Where equities are equal the law must prevail.”¹⁶ But, assuming that the decision is erroneous in respect to this point, this does not impeach it in respect to the point of the lien of the mortgage being a legal lien.

There are some other cases to the same effect,¹⁷ though lacking the explicit statements of principles contained in the cases above referred to. The writer has found no cases upon similar facts conflicting with the foregoing.

It is worth while to notice the practical effect of a doctrine contrary to that maintained by these cases. A mortgagee who succeeded in foreclosing before he received any notice of such “unwritten” equities would be unaffected by them, whereas, if he happened to receive such notice before foreclosure, he would be postponed to them. This would mean that prudence required a mortgagee to foreclose at the earliest possible moment and that any indulgence to the mortgagor, in the way of extension of time, would be at the hazard of his security—a rule of diligence which we believe would be a surprise to the most cautious counsellors and a result which could hardly have been contemplated by those Courts and legislatures which interfered between mortgagor and mortgagee to modify the theory of the mortgage for the protection of the former.

In conclusion, and while we have before us these problems concerning the right of the mortgagee as against third

¹⁶ See Jones, *Corporate Bonds and Mortgages*, sec. 117.

¹⁷ *Austin v. Pulachen*, 112 Cal. 528; *Gaar v. Milliken*, 68 Ind. 208; *Broward v. Hoeg*, 15 Fla. 372; *Watts v. Corner*, 8 Tex. Civ. App. 588; *Parsons v. Crocker*, 128 Ia. 641.

persons to subject the land to the satisfaction of his debt, which bring us face to face with the ultimate and substantial nature of the mortgage, as distinguished from those incidental and technical questions, such as the manner and means of assigning and discharging the mortgage, or the right to possession and the maintenance of legal actions before foreclosure—while these problems concerning the very substance of the mortgage are before us, let us take a broad view of the fundamental question in hand. Bearing in mind that the lien of the mortgage ripens by foreclosure into a full legal title, and that this process does not require any act upon the part of the mortgagor, further than the execution of the mortgage and default in its payment, and bearing in mind that in this respect the foreclosure of a mortgage differs from the specific performance of a contract for the sale of land, which, in the absence of a statute conferring on the Court jurisdiction *in rem* to execute a conveyance by its Master or otherwise,¹⁸ requires the actual execution of a conveyance by the vendor, under compulsion if necessary; and bearing in mind, also, that, unlike the title acquired upon specific performance of a contract, which dates from the conveyance and not from the execution of the contract, the title acquired by foreclosure relates back to the execution of the mortgage so as to cut off intervening incumbrances¹⁹—bearing in mind these features of mortgage fore-

¹⁸ There is probably in all of the states more or less statutory authority for the common foreclosure and sale in equity but such authority is not essential. *Lansing v. Goelet*, 9 Cow. 346; *Byron v. May*, 2 Chand. (Wis.) 103; and see, *Benjamin v. Cavaroo*, 2 Woods 168; *Carroll v. Deimel*, 95 N. Y. 252; *Downing v. LeDu*, 82 Cal. 471, *Morrison v. Bean*, 15 Tex. 267. In at least one of the lien states the Court has inherent jurisdiction to decree strict foreclosure (*Judd v. Hayward*, 4 Minn. 483; *Drew v. Smith*, 7 Minn. 301) by virtue of which the lien of the mortgage ripens into a legal title in the lands of the mortgagee without a sale.

¹⁹ See Jones, Mortgages, sec. 1654.

NOTE.—In the foregoing discussion the question has been considered as one of an alternative between legal lien and equitable lien. As noted in the writer's former article on this subject, there is some authority for a third position, viz., that the mortgage is merely a chose in action or contract and creates no interest in the land, legal or equitable. In this connection it should be observed that the foregoing authorities are inconsistent with this theory. The equitable doctrine of *bona fide* purchase requires not only legal rights but legal rights *in rem*. That doctrine is merely negative, that under certain circumstances the Court will not interfere with legal rights but leave parties holding them to their full enjoyment, unimpaired by equity. To one who had, at law, no estate or interest *in rem* in the land, but merely a right against certain persons in respect thereto, such non-interference would be of no avail against third persons.

closure, is it not manifest that, at the time of its execution, the mortgage raises a potentiality of legal ownership of the land, which, subject to all its limitations as a potentiality, must be a legal interest in the land. Can we, consistently with the theory of real property, conceive of a merely equitable or contractual interest in land ripening into a legal estate without the aid of a statute or a conveyance by the legal owner? It is submitted that we cannot.

EDGAR N. DURFEE.

University of Michigan.

FREEDOM OF CONTRACT.

The important *dictum* of Jessel, M.R., in 1875, "You have this paramount public policy to consider, that you are not lightly to interfere with this freedom of contract," may be taken as embodying the most general principle of the whole law of contract. It represents what has always been the general policy of the law with regard to freedom of contract, viz.: that the validity of a contract is the rule; its invalidity is the exception. For as neither the right of free speech, nor the right of public meeting is expressly established by any positive enactment, still less is the right of freedom to contract. And yet the latter is of more importance than the two former; because this freedom of contract means nothing less than to establish legal rights and liabilities enforceable at law, and the power to invoke the aid of the law for the actual enforcement of these rights and liabilities which the parties to the contract have created. For a contract is "an agreement *enforceable at law*, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others."¹

Sir Henry Maine says that in primitive systems of law there were no crimes, but only torts.² It would be as true

¹ Anson, *Law of Contract*, 13th edition (1912), p. 10.

² *Ancient Law*, edition of 1906, p. 379.

to say that the law of tort was antecedent to the law of contract, and that the latter was to some extent formed from the law of tort.

By the end of the reign of Edward I, the legal recognition of the principle of contract was still imperfect. Even then there were only two kinds of contracts, viz.: (1) the solemn contract under seal; and (2) the executed contract; of which one had already performed his part, and which resembled the contracts *re* of the Roman law. But the English writs of debt, detinue, and account, provided no remedy for the breach of an executory contract (in which neither party had as yet performed his part), nor even for breach of an executed contract where only an unliquidated sum was due for services actually performed.

In some cases, according to Maine, the legal remedy is antecedent to the legal right,³ and it would seem to be so in those cases of executory contract not yet provided for by the existing law of contract in the time of Edward I.

In one important particular the law of contract has been evolved from the law of tort. The old common law writ of trespass, *vi et armis*, was necessarily confined to cases of some positive wrongful act; for even though the scope of the action at law were extended and the *vi et armis* to become a mere technicality, it would still be impossible to enable the remedy to cover anything but actual malfeasance.

Moreover, it was forbidden by the Provisions of Oxford (1259), that any new writs, other than the writs of course then on the register, should be issued by the chancellor without the consent of the King and his council; consequently, the development of the law of tort was for a time checked. But by a statute of Edward I, viz., the Statute of Westminster II, ch. 24, it was provided that whenever new cases arose, analogous to those already provided for by the writs of course, then new writs should be drawn up in Chancery similar to the old forms, so that justice might be done.

Hence this Act has been called the statute *In consimili casu*. In an action based on this statute, the writ was called the writ of trespass on the case. It was essential that this writ of trespass on the case should state a *prima facie* case: (1) that the defendant owed a duty to the plain-

³ Ancient Law, ch. II.

tiff, and (2) that the defendant in breach of this duty did something causing detriment to the plaintiff. This duty might be one imposed by law (*e.g.*, to abstain from violence), in which case the action was for tort pure and simple, and the old writs of trespass generally sufficed; in other words, the action was for malfeasance.

But since the statute *In consimili casu* (1285), the recognized duty, instead of being one simply imposed by law, might also be one which the defendant had taken on himself (*super. se assumpsisset*): in which case the action of *assumpsit* and the writ of trespass on the case were available. But at first, even the Court of Chancery was wary of extending the scope of these actions and writs; and they were confined to cases in which the defendant had actually commenced what he had undertaken, and had done it so badly as to do more harm than good, thereby causing detriment to the plaintiff; in such case the action was for misfeasance.

The process of development of the law of contract out of the law of tort, by means of an action for misfeasance, may be divided under two heads:—

(1) Persons professing to follow certain vocations and holding themselves out to perform certain services, *e.g.*, inn-keepers, common carriers, smiths, and surgeons, were held liable to an action of trespass on the case for negligence in omitting to shew such care and skill as one might reasonably expect of them in the performance of their work; and this was on the ground of public policy.

(2) Whether the defendant had or not openly professed and held himself out to perform services of a certain kind, he might be held liable for negligence in an action of trespass on the case, if it was the gist of the action that the defendant had specially undertaken to be liable for damage that might arise from his negligent or insufficient performance of the work.

The first class of cases calls for little comment: it is difficult to draw any hard and fast distinction between the two, and it would seem that in both classes of cases there was considered to be some element of deceit or fraud on the defendant's part amounting to tort. The first case in which this principle was recognised was in the reign of Edward III; in this case the defendant, having undertaken to convey plaintiff's cattle across the Humber, had so over-loaded

his (the defendant's) own boat, that it was upset and the cattle were drowned; the objection that the action should have been in covenant was over-ruled; and it was held that the overloading of the boat was a trespass.⁴

The second case of misfeasance was in 1370 (still in the reign of Edward III). In this case, the defendant, having undertaken to cure the plaintiff's horse, had done the work so negligently that the horse died; again it was objected by the defendant that the proper action was covenant; and again this objection was over-ruled; and it was held that the action was rightly framed in tort for negligence.⁵

In the reign of Henry IV the Judges refused to extend the principle of the law with regard to misfeasance; they decided that mere nonfeasance could not be triable by action of trespass on the case.⁶ But in 1425 there was a difference in the opinions of the Judges; and though the opinion of Martin prevailed, viz., that mere nonfeasance was not triable by action of trespass on the case, yet there was a dissenting judgment in favour of extending the scope of this action.⁷

The next recorded action of trespass on the case, in which the principle of the law with regard to misfeasance was further extended, was in 1433, viz., the case of J. Somerton.⁸ In this case the facts were as follows: The defendant had agreed to act as counsel for the plaintiff in negotiating for the purchase of a manor, and plaintiff had agreed to pay defendant a fixed sum for his services; but the defendant, in fraud of his agreement, had become of counsel to a second employer, to whom he betrayed the plaintiff's secrets, and bought the manor for the second employer instead. The actual issue of this case is uncertain; but it would seem that the Judges held that the defendant's deceit was actionable even apart from his having entered on his proper work. "Matter which lies in covenant may by matter arising *ex post facto* become deceit" [*per* Cotesmore].

And this extended principle of the action of trespass on the case was distinctly affirmed three years later by Newton in 1436:⁹ after laying down certain principles already

⁴ 22 Ass., pl. 41, f. 94; the Register, ff. 105b, 108, 110b.

⁵ Y. B., 43 Edw. III, Mich., pl. 38.

⁶ *Ibid.*, 2 Hen. IV, Mich., pl. 9.

⁷ *Ibid.*, 3 Hen. VI, Hil., pl. 33.

⁸ *Ibid.*, 11 Hen. VI, Hil., pl. 10; Pasch., pl. 1; Trin., pl. 26.

⁹ Y. B., 14 Hen. VI, p. 18.

recognized, he said: "If a doctor takes upon himself to cure me, and he gives me medicines but does not cure me, I shall have action on my case . . . and the cause is in all these cases that there is an understanding and a matter in fact beyond the matter which sounds merely in covenant: in these cases the plaintiffs have suffered a wrong." And Judges Juyn and Paston held that nonfeasance was actionable as well as misfeasance: "for all that [misfeasance] is dependent upon the agreement and merely accessory to it; and as I have action upon that which is accessory, I shall have an action on the principal."

These decisions mark some advance on those of the reign of Henry IV, in which it had been decided that mere nonfeasance was not triable by action of trespass on the case. This advance is distinctly noticeable in the reign of Henry VI: in 1425 it was first suggested that mere nonfeasance was actionable as well as misfeasance.

It would seem, however, that even in 1436 this was still merely an *obiter dictum*; and Judge Martin had previously said in 1425 that it would mean "that one shall have trespass for any breach of covenant in the world,"¹⁰ and Dr. Holdsworth considers that its acceptance would have made it impossible to distinguish between agreements which the law would enforce and those which it would not enforce.¹¹

In 1442, a Bill of Deceit was brought in the King's Bench,¹² it being alleged that the defendant had agreed to sell land to the plaintiff, that plaintiff had actually paid him £100 for it, and that defendant in fraud of his agreement had then enfeoffed another person instead. Here the distinction between misfeasance and nonfeasance was further narrowed down; it was pointed out that to enfeoff a stranger and not to enfeoff the plaintiff was the same thing; if no action lay for the latter, how could there be an action for the former? It seems to have had some weight with the Judges that the price had already been paid, but Judges Newton and Prisot held that a mere contract to sell land at a fixed price would entitle the purchaser to an action even though the price had not been paid, and would entitle the vendor to an action even though the land had not been conveyed. It would seem that the above cases of misfeasance

¹⁰ Y. B., 3 Hen. VI. Hil., pl. 33.

¹¹ History of English Law, Vol III, p. 337.

¹² Y. B., 20 Hen. VI, Trin., pl. 4.

were decided against the defendants on the ground that there was an element of deceit in the defendant's conduct. In 1487, however, it was held that the traverse of the alleged feoffment to another was good, because the feoffment to another was essential to an action for misfeasance;¹³ but this was the last time the old distinction was upheld, for in 1504, Frowych, C.J., says:—"If I sell you my land and agree to enfeoff you and do not, you shall have a good action on the case."¹⁴

The reign of Henry VII. marks the definite abandonment of the old distinction between misfeasance and nonfeasance in the action of deceit on the case. The reason for this gradual recognition of executory contracts by the Common-law Courts was, that in so many cases the Court of Chancery was ready to grant a remedy where the Common law failed to do so. It is even said that there had been, as early as the beginning of the reign of Henry VI., a Chancery writ for an action on a wholly executory contract. But it was not till late in the reign of Henry VII. that the Common-law Judges distinctly recognized the right to proceed by action of assumpsit for nonfeasance as well as for misfeasance. Even then the words of Frowych leave it very doubtful whether the plaintiff could have succeeded under any circumstances, unless he had already performed his part of the agreement (viz., paid the money). In other words, it was not yet settled law that a wholly executory contract could be sued on.

But at last, in the case of *Norwood v. Read*,¹⁵ it was definitely decided that "every contract executory is an assumpsit in itself." In *Slade's Case*¹⁶ it was finally settled that assumpsit lay upon any debt, and that "every contract executory imports in itself an assumpsit." But the great case in point is the case of *Nichols v. Raynberd*,¹⁷ in this case plaintiff had agreed to deliver to defendant a cow; in consideration of which promise, the defendant had promised to pay plaintiff 50s. Plaintiff brought action of assumpsit; and it was held that he need not aver the delivery of the cow, because the consideration was promise for promise. And thus, there is yet another respect in

¹³ *Ibid.*, 2 Hen. VII, Hil., pl. 15.

¹⁴ *Ibid.*, 20 Hen. VII, Mich., pl. 18.

¹⁵ 1557, Plowden, 180.

¹⁶ 1603, 4 Co. Rep. 92a.

¹⁷ 1615, Hobart, 88.

which these decisions, and especially this last, are important. In the course of these decisions, which first made nonfeasance as well as misfeasance actionable, and then made a wholly executory contract actionable, there grew up the doctrine of consideration. It would seem that this doctrine of consideration was originally an equitable doctrine, and that it was adopted by the Common-law Courts from the Court of Chancery. As the action for nonfeasance of an executory contract was evolved out of the old action of trespass on the case, so meanwhile the doctrine of consideration (or *quid pro quo*) advanced *pari passu*. In those nonfeasance cases in the reign of Henry VII., the consideration for the defendant's promise was nothing less than actual performance by the plaintiff, which the defendant had obtained in fraud of his own agreement; hence the "action of deceit." But in these later cases of executory contracts in the reigns of Elizabeth and James I., it was not thought necessary that the defendant should have reaped any actual advantage from his breach of faith; the consideration (or *quid pro quo*) was promise for promise; and the test-question was not what the defendant had gained, but what the plaintiff had lost. As the action of assumpsit gradually acquired a more contractual and less of a delictal character, the measure of the damages became settled on the principle of what the plaintiff had lost by the defendant's conduct—and by the defendant's conduct, not necessarily in first making the agreement and then breaking it, but merely in breaking the agreement when made. From this it is but a short step to regard contractual right as a right *in rem*, viz., a right not merely as against the other party to the contract, but as against all the world; and for which right an action for damages will lie against anybody who interferes with it. In 1844, in the case of *Brown v. Boorman*,¹⁸ Lord Campbell held that "wherever there is a contract, and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may either recover in tort or in contract." Only nine years later, in the case of *Lumley v. Gye*,¹⁹ it was held for the first time that an action lay (against a third party) for procuring a breach of any contract; though as it seems there had been an old

¹⁸ 11 Cl. & Fin., p. 44; 65 R. R., p. 10.

¹⁹ 1853, 2 El. & Bl. 216

Common-law action by a master against a third party (in tort) "for harbouring a servant."

The cases illustrating the gradual evolution of a great part of the law of contract from the law of tort must show that as there is practically no limit to the possible kinds of trespass for which an action may be available, so there is *primâ facie* no limit to the conceivable instances of broken contracts for which damages may be claimed. In other words, the validity of a contract is the rule, its invalidity the exception.

The doctrine of consideration was adopted by the Common-law Courts from the Chancery; there is evidence of the origin of this doctrine in the practice of the Chancellor of inquiring into the intentions of the parties, in those contracts where there was no special solemnity of form (viz., the sealed document) to constitute the contract and make it absolute in itself. The consideration was held to supply evidence of the intentions of the parties, and hence of the nature of the contract. There was little, if any, connection between the old Common-law theories of trespass and the new equitable principle of consideration; though the former may have prepared the way for the latter. It is one thing to say that the plaintiff must have incurred some detriment through acting in reliance on the defendant's promise; and quite another to say that the defendant must have had some legally sufficient inducement for making his promise.

The consideration (or *quid pro quo*) is not and never was the essence of a contract; and much less is the execution of the consideration (as work done) by the promisee. This is a most important particular to which we shall revert later. The mere fact of work having been done is not a *causa debendi*, and creates no obligation whatever. And whatever the *causa debendi* may be, the *debitum* which does constitute the obligation is the promise by one of the parties and the agreement of both.

The consideration whether executed or executory is not the essence of the contract, but rather a sort of buttress to support it. As late as 1765, Lord Mansfield (a great authority on moral obligation) held that agreements in writing, at all events in commercial affairs, were valid without any consideration at all.²⁰ And though this particular

²⁰ 3 Burrows, 1663.

dictum has not been followed in subsequent decisions, it is said by Anson²¹ that the views of Lord Mansfield are a useful corrective to the impression of those who think that the rules of the law of contract from their logical completeness are inevitable.

That there must be a *causa* or some adequate lawful motive for contracting the debt, originated in the Canon law; and so the idea found expression in Courts of Equity in the fifteenth century through the Chancellors, who at that time were all ecclesiastics. This is evident from *The Doctor and Student*, a treatise on the Canon law of the sixteenth century. And yet there has been considerable doubt as to whether there is any connection between this *causa* in the sense of the Canon law and the modern doctrine of consideration. It is true that there are important differences between the mediæval and the modern principle. There were also diversities of view in some of the earliest applications of the principle requiring a *causa*. Molina, a jurist of the sixteenth century (following the opinion of Felinus), regards the *causa* as a sort of rule of evidence to indicate the intention of the parties and prove the existence of the contract—" . . . *necessariam esse causae expressionem: alioquin reus non cogetur solvere nisi actor causam sufficienter probet.*"²²

On the other hand, Lord Bacon thought it necessary to correct this canonical and mediæval view, by distinctly laying it down that "you shall never find a reason for this to the world's end in the law; but it is a reason of Chancery, and it is this: that no Court of conscience will enforce *donum gratuitum*, though the intent appear never so clearly."²³ There is yet another important difference between the canonical and the equitable, viz., between the mediæval and the modern view. In *The Doctor and Student*, the Canon law is explained as follows:—

"If A. promise to give B. £20 because *he hath* made him such a house, or *hath* lent him such a thing or such other like, I think him bound to keep his promise. But if his promise be so naked that there is no manner of consideration why it should be made, then I think him not bound to perform it, for it is to suppose that there was some error

²¹ Law of Contract, 13th edition, p. 65.

²² Molina: *De Justitia, Disput.* 257.

²³ Bacon: Reading on the Statute of Uses.

in the making of the promise. . . . And in all such promises it must be understood that he that made the promise intended to be bound by it, for else, commonly after the doctors, he is not bound, unless he was bound to it before his promise”

This is very different from the modern doctrine of consideration as laid down in the cases of *Eastwood v. Kenyon*, in 1840,²⁴ and *Roscorla v. Thomas*, in 1842,²⁵ viz., that to support a promise the consideration must be either present or future, and that past consideration is to no purpose.

But as it seems to the present writer, there are two currents of thought existing from mediæval and distinctly traceable down to modern times. In the case of *Lampleigh v. Brathwait*, in 1614,²⁶ the old canonical view of Felinus and Molina was upheld to this extent—that a past consideration, if granted at the request of the promisor—is a sufficient *causa* to support the subsequent promise, which in this case was held enforceable by action of assumpsit. In this case it was held that, as a matter of fact, the original compliance with a request was not with a view to creating a legal obligation, but was “a mere voluntary courtesie”; and yet this compliance was held sufficient *causa* to support a subsequent promise by the party whose request had been complied with. This looks something like the recognition of a purely moral obligation as sufficient *causa* to support a promise; the compliance could scarcely be regarded as evidence even of the intention to make the subsequent promise, still less of its having been made. The next case in which the same question was raised was not till 1835. In the meantime, Lord Mansfield had said in 1765,²⁷ that consideration was required as evidence only, and that in commercial cases a promise in writing need not be supported by consideration. Exactly the opposite was held by the Exchequer Chamber and by the House of Lords in 1778, in *Rann v. Hughes*,²⁸ namely, that a merely moral obligation is not sufficient consideration to support a promise. But in *Lee v. Muggeridge*,²⁹ in 1813, Mansfield, C.J., again held, even more distinctly, that a moral obligation was sufficient consideration to support a subsequent promise.

²⁴ 11 Adolphus and Ellis, 438.

²⁵ 3 Q. B. 234.

²⁶ 1 Smith's Leading Cases, 11th ed., 141, and Hobart, 105.

²⁷ *Pillans v. Van Meerop*.

²⁸ 7 T. R. 350.

²⁹ 5 Taunton, 36.

In this case Mansfield, C.J., and Gibbs, J., held that "wherever there is an antecedent moral obligation and a subsequent promise to perform it, it is of sufficient validity for the plaintiff to be able to enforce it." In the case of *Wilkinson v. Oliveira*, in 1835,³⁰ the promise to pay was admittedly subsequent to the alleged consideration; and yet Tindal, C.J., described the promise and the consideration as "mutual," presumably on the assumption that there was an implied promise at the time when the antecedent consideration was requested by the promisor, and that the subsequent promise was a sort of ratification of it. As far as it goes, this decision of Tindal, C.J., rather supports Lord Mansfield's view, but not very strongly. The theory of moral obligation, as being a sufficient cause to support a promise, must have received a somewhat severe shock in the case of *Eastwood v. Kenyon*, in 1840;³¹ then Lord Denman said that "the doctrine of moral obligation would annihilate the necessity of any consideration at all, inasmuch as the mere fact of giving a promise creates a moral obligation to perform it;" he goes on to say, that such a thing was not heard of until the time of Lord Mansfield, and to imply that Lord Mansfield had dragged it in unnecessarily. It was decided in this case that past consideration was no consideration at all; and the same thing was also decided in *Roscorla v. Thomas*, in 1842.³² In the case of *Kaye v. Dutton*, in 1844,³³ Tindal, C.J., held that, "where the consideration is one from which a promise is by law implied" —as in some cases the acceptance of services imports a promise to pay for them—"no express promise made in respect of that consideration after it has been executed, and differing from that which is by law implied, can be enforced." This *dictum* may be considered as throwing some light on the previous decision of Tindal, C.J., in *Wilkinson v. Oliveira*. In other words, whatever the antecedent implied promise may have been—if there was one at all—the subsequent express promise must not differ materially from it.

Thus we observe three rival theories as to the doctrine of consideration:—(1) the highly artificial doctrine of the Common-law Judges (as per Lord Denham, 1840), perhaps the more artificial because originally borrowed from Equity,

³⁰ 1 Bingham's New Cases, 490.

³¹ 11 Adolphus and Ellis, 438.

³² 3 Q. B. 234.

³³ 7 Manning and Granger, 807.

viz., that there must be (present or future) consideration to support a promise; (2) the doctrine of moral obligation (as per Lord Mansfield); and (3) the old canonical view of consideration as having a merely evidentiary value.

The theory of moral obligation may be considered as disposed of; but not so the canonical or evidentiary view of consideration. In the case of *Bradford v. Roulston*, in 1858,⁸⁴ it was held, that a past consideration granted at the request of the defendant was sufficient to support the defendant's subsequent promise in writing. The facts were fairly simple; the defendant introduced to the plaintiff two friends desirous of buying a ship but lacking £55 of the price; then, at the defendant's request, the plaintiff allowed the purchasers credit for the £55; subsequently, the defendant guaranteed in writing the payment of the £55.

Plaintiff sued for the amount; and it was held, that because the past consideration of allowing the purchasers credit had been at the defendant's request, therefore it was sufficient to support the defendant's subsequent promise. In this case the authorities were carefully quoted, and the rule in *Lampleigh v. Brathwait* strictly adhered to. However, it is considered by some writers that *Lampleigh v. Brathwait* and *Bradford v. Roulston* must either be supported on some different ground or abandoned. For according to Pollock, "there is no satisfactory modern instance of this doctrine, and it would perhaps now be held that the subsequent promise is only evidence of what the parties thought the service worth."⁸⁵ And likewise Anson, "the correct view seems to be that the subsequent promise is only binding when the request, the consideration, and the promise form substantially one transaction, so that the request is virtually the offer of a promise, the precise extent of which is hereafter to be ascertained."⁸⁶

The less artificial and more logical reason here suggested by the two modern writers was actually adopted by Bowen, L.J., in *Stewart v. Casey*,⁸⁷ but without discarding the old *ratio decidendi* of *Lampleigh v. Brathwait* and *Bradford v. Roulston*.

In *Stewart v. Casey*, Lord Justice Bowen said: "Even if it were true, as some scientific students of law believe.

⁸⁴ 8, Irish Common Law Reports, 468.

⁸⁵ Principles of Contract, 8th ed., p. 189.

⁸⁶ Law of Contract, 13th ed., p. 122.

⁸⁷ L. R. [1892], 1 Ch. 115.

that a past service cannot support a future promise, you must look at the document and see if the promise cannot receive a proper effect in some other way. Now the fact of a past service raises an implication that at the time it was rendered it was to be paid for, and, if it was a service which was to be paid for, when you get in the subsequent document a promise to pay, that promise may be treated either as an admission which evidences, or as a positive bargain which fixes, the amount of that reasonable remuneration, on the faith of which the service was originally rendered. So here for past services there is ample justification for the promise to give the third share."

The *dictum* of Bowen, L.J., is the last word of legal decision on the subject of past consideration. The same principle was admitted by the defendant in *Marshall v. McLaughlin*,²⁸ in which the present writer was plaintiff; in which case the actual promise was verbal merely, whereas in *Bradford v. Roulston* and *Stewart v. Casey* it was in writing.

Thus we see that the present law requiring consideration to support a promise is highly composite; it is the joint product of the above-mentioned decisions, which — apart from those of Lord Mansfield—are consistent or at least reconcilable with each other. There is the artificial Common-law rule, itself borrowed from Equity, that there must be (present or future) consideration; there is the equally artificial Common-law exception to this rule, viz., the exception in favour of past consideration, laid down in the cases of *Lampleigh v. Brathwait* and *Bradford v. Roulston*.

There is also the old canonical rule, traceable back to the Middle Ages and the writings of Felinus and Molina, which regards the consideration for a promise as having a merely evidentiary value; this evidentiary view of consideration is still supported by the modern authorities on *Lampleigh v. Brathwait* and *Bradford v. Roulston*, and especially by Bowen, L.J., in *Stewart v. Casey*; although these modern authorities fall far short of upholding the old canonical view, viz., that the consideration necessary to support a promise is only important as having a merely evidentiary value as to the existence of the agreement.

R. L. MARSHALL.

²⁸ In the Lambeth County Court of Surrey, March, 1905.

SUPREME COURT DECISIONS.

WEST v. CORBITT.

N.B.]

*Negligence—Railway—Prescription — Damage or Injury
“by Reason of Construction”—Contractor—Transcontinental
Railway Commissioners—Railway Act, sec. 306.*

Sec. 15 of The National Transcontinental Railway Act provides that “the Commissioners shall have, in respect to the Eastern Division, . . . all the rights, powers, remedies and immunities conferred upon a railway company under the Railway Act.”

Held, Fitzpatrick, C.J., and Idington, J., dissenting, that the provision in sec. 306 of the Railway Act that “all actions or suits for indemnity for any damage or injury sustained by reason of the construction or operation of the railway shall be commenced within one year,” etc., applies to such an action against the Transcontinental Railway Commissioners and also against a contractor for construction of any portion of the eastern division.

Held, per ANGLIN, J., that it applies also to an action against a contractor for constructing a railway for a company incorporated by Act of Parliament.

Appeal dismissed with costs.

F. R. Taylor, for appellant.

Reed, K.C., for respondents.

STONE v. CANADIAN PACIFIC R. W. CO.

ONT.]

Railway—Company — Negligence—Foreign Car — Protection of Employees—R. S. C. (1906), ch. 37, sec. 265, sub-sec. 1 (c).

The C. P. R. Co. had received a car with freight from the Wabash Co., and before returning used it in a shunting

operation. A brakeman on top of this car, which was approaching another with which it was to be coupled, saw that the knuckles of the coupler on each car were closed and, being unable to signal the engineer to stop, climbed down a side ladder, none being on the ends, and tried to reach round to the lever of the coupler. In doing so he held on with his left hand to a rung of the ladder only twenty inches above where his left foot was placed. There was no room for his other foot and as the train went over a crossing he was jolted off and fell with his right arm under the wheels of the car, injuring it so that it had to be amputated. In an action against the company, the jury found that the latter was negligent in not having end ladders on the Wabash car nor levers of sufficient length. A verdict for the plaintiff was set aside by the Court of Appeal (26 Ont. L. R. 121).

Held, reversing the latter judgment, that the company was liable for non-compliance with the provisions of sec. 264, sub-sec. 1 (c) of the Railway Act.

FITZPATRICK, C.J., dissented on the ground that the plaintiff's own negligence caused the accident.

Appeal allowed with costs.

Creswicke, K.C., and C. C. Robinson, for appellant.

Hellmuth, K.C., and MacMurchy, K.C., for respondents.

ROBINSON v. GRAND TRUNK R. W. CO.

ONT.]

Railway Company — Carriage of Passenger — Special Contract — Notice to Passenger of Conditions—Negligence—Exemption from Liability.

P., at Milverton, Ont., purchased a horse for a man in another town, who sent R. to take charge of it. P. signed the way-bill in the form approved by the Board of Railway Commissioners, which contained a clause providing that if the consignee or his nominee should be allowed to travel at less than the regular fare to take care of the property the company should not be liable for any injury to him whe-

ther caused by negligence or otherwise. R was not asked to sign the way-bill though a form endorsed provided for his signature and required the agent to obtain it. The way-bill was given to R., who placed it in his pocket without examining it. On the passage he was injured by negligence of the company's servants.

Held, that B. was not aware that the way-bill contained conditions.

Held, also, FITZPATRICK, C.J., dissenting, that the company had not done all that was incumbent on them to bring notice of the special condition to his attention.

Judgment of the Court of Appeal (27 Ont. L. R. 290), reversed, and that of the trial Judge (26 Ont. L. R. 437), restored.

Appeal allowed with costs.

McKay, K.C., and *Haight*, for appellant.

D. L. McCarthy, K.C., for respondent.

MERRITT v. TORONTO.

ONT.]

Riparian Rights—Interference—Evidence.

M., claiming to be a riparian owner on the shore of Ashbridge Bay (part of Toronto harbour), claimed damages from, and an injunction against, the city for interference with his access to the water when digging a channel along the north side of the bay.

Held, affirming the judgment of the Court of Appeal (27 Ont. L. R. 1), by which an appeal from a Divisional Court (23 Ont. L. R. 365), was dismissed, that the evidence established that between M.'s land and the Bay was marsh land and not land covered with water as contended, and, therefore, M. was not a riparian owner.

Appeal dismissed with costs.

Mowat, K.C., for appellant.

Geary, K.C., and *Colquhoun*, for respondent.

TORONTO RY. CO. v. FLEMING.

ONT.]

Negligence—Street Railway—Explosion — Defective Controller—Inspection.

S. was riding on the end seat of an open street car in Toronto when an explosion occurred. The car was still in motion when other passengers in the same seat, apparently in a panic, cried to S. to get off, and when he did not do so, endeavoured to get past him, whereby he was pushed off and injured. In an action for damages the jury found the company negligent in using a rebuilt controller in a defective condition and not properly inspected, and the motorman negligent in not applying the brakes.

Held, affirming the judgment of the Court of Appeal (27 Ont. L. R. 332), that the evidence justified the jury in finding that the controller had not been properly inspected and that a proper inspection might have avoided the accident.

Held, per IDINGTON and BRODEUR, JJ., ANGLIN and DAVIES, JJ., contra, that the motorman should have applied the brakes.

Appeal dismissed with costs.

D. L. McCarthy, K.C., for appellants.
Gamble, K.C., for respondent.

McGUIRE v. OTTAWA WINE VAULT CO.

ONT.]

Fraudulent Conveyance—Statute of Elizabeth — Husband and Wife—Voluntary Settlement—Evidence.

In August, 1908, M. and his brother bought a hotel business in Ottawa for \$8,000, paying \$6,000 down and securing the balance by notes which were afterwards retired. In November, 1908, M. conveyed a hotel property in Madoc

to his wife subject to a mortgage which she assumed. M. and his brother carried on the Ottawa business until March, 1910, when they assigned for benefit of creditors, who brought suit to set aside the conveyance to M.'s wife. On the trial it was shewn that for some time before November, 1908, M.'s wife had been urging him to transfer to her the Madoc property which she had helped him to acquire, as a provision for herself and their children; that she had joined in a conveyance of a property in Toronto in which they both believed she had a right of dower, and the proceeds of the sale of which were applied in the purchase of the Ottawa business; and that all of M.'s liabilities at the time of said conveyance had been discharged. M. ascribed his failure in Ottawa to the action of the License Commissioners in compelling him to move his bar to the rear of the premises whereby his receipts fell off and he lost rents that he had theretofore received, and had to make extensive alterations; and to a fire on the premises early in 1910. The trial Judge set aside the conveyance to M.'s wife; his judgment was reversed by a Divisional Court (24 Ont. L. R. 591), but restored by the Court of Appeal.

Held, affirming the judgment of the Court of Appeal (27 Ont. L. R. 319), DAVIES, J., dissenting, that the conveyance by M. to his wife was voluntary; that it denuded him of the greater part of his available assets and was void as against his present creditors.

Appeal dismissed with costs.

Proctor, for appellant.

Hogg, K.C., for respondents.

PETERS v. SINCLAIR.

ONT.]

Trespass — Easement—Public Way—Dedication—User — Prescription.

S. brought action against P. for trespass on a lane called Ancroft Place, which he claimed as his property and asked

for damages and an injunction. Said lane was a *cul de sac* running from Sherbourne street on the west, and the defence to the action was that it was a public street or, if not, that P. had a right of way over it either by grant or user. On the trial it was shewn that the original owners had conveyed the lots to the east and south of Ancroft Place to different parties, each deed giving a right of way over it to the grantee and to those to whom the owner had conveyed or might thereafter convey the lot to the north (now P.'s land). The deed to P.'s predecessor in title did not give him a similar right of way. The deed to the predecessor in title of S. had a plan annexed shewing Ancroft Place as a street fifty feet wide and the grantee was given the right to register said plan with the deed. The evidence also established that for several years before the action Ancroft Place had not been assessed and that the city had placed a gas lamp on the end near Sherbourne street; also, that for over twenty years it had been used by the owner of the lot to the north, and by the owners of adjoining lots, as a means of access to, and egress from, their respective properties. In 1909 the fee in the lane was conveyed to S., who had become owner of the lots to the east and south.

Held, IDINGTON, J., dissenting, that the evidence was not sufficient to establish that the lane had been dedicated to the public and accepted by the municipality as a street.

Held, further, IDINGTON, J., dissenting, that the lane was not a "way, easement, or appurtenance" to the lot to the north "held, used, occupied and enjoyed, or taken or known, as part and parcel thereof," within the meaning of sec. 12 of "The Law and Transfer of Property Act," R. S. O. (1897), ch. 119.

Held also, that P. had not acquired a right of way by a grant implied from the terms of the deeds of the adjoining lots nor by prescription.

Appeal dismissed with costs.

Tilley and J. D. Montgomery, for appellant.

Ludwig, K.C., for respondent.

CROSS v. CARSTAIRS.

ALTA.]

Appeal—Jurisdiction—Provincial Election—"Alberta Controverted Elections Act"—Preliminary Objections—"Judicial Proceeding"—"Final Judgment."

Held, per DAVIES, IDINGTON, and ANGLIN, JJ., that under the provisions of the "Alberta Controverted Elections Act," the judgment of the Supreme Court of the province in proceedings to set aside an election to the legislature is final and no appeal lies therefrom to the Supreme Court of Canada.

Held, per DUFF, J., that a proceeding under said Act to question the validity of an election is not a "judicial proceeding" within the contemplation of section 2 (c) of the "Supreme Court Act" in respect of which an appeal lies to the Supreme Court of Canada.

Held, per BRODEUR, J., that the judgment of the Supreme Court of Alberta on appeal from the decision of a Judge on preliminary objections filed under the "Controverted Elections Act" is not a "final judgment" from which an appeal lies to the Supreme Court of Canada.

Appeal quashed with costs.

Ewart, K.C., for the motion.

Laflleur, K.C., and O. M. Biggar, contra.

CITY OF MONTREAL v. LAYTON.

QUE.]

Construction of Statute—"Quebec Public Health Act"—R. S. Q. 1909, Art. 3913—Inspection of Food—Duty of Health Officers—Quality of Food—Condemnation—Seizure—Notice—Effect of Action by Health Officers—Controlling Power of Courts—Evidence—Injunction—Appeal—Jurisdiction—Question in Controversy.

Per FITZPATRICK, C.J.:—In the Province of Quebec, in order to constitute a valid seizure of movable property there

must be something done by competent authority which has the effect of dispossessing the person proceeded against of the property; notice thereof must be given; an inventory made and a guardian appointed. Where these formalities have not been observed there can be no valid seizure. *Brook v. Booker* (41 Can. S. C. R. 331), referred to.

Per FITZPATRICK, C.J.:—Extraordinary powers, conferred by statute, authorizing interference with private property must be exercised in such a manner that the rights of the owners may not be disregarded. *Bonanza Creel Hydraulic Concession v. The King* (40 Can. S. C. R. 281), and *Riopel v. City of Montreal* (44 Can. S. C. R. 579), referred to.

Per FITZPATRICK, C.J., and DAVIES and IDINGTON, JJ.:—The authority conferred upon health officers by the "Quebec Public Health Act," respecting the condemnation, seizure, and disposal of food, as being deleterious to the public health, is not final and conclusive in its effect, but it is to be exercised subject to the superintending power, orders and control of the Superior Court and the Judges thereof.

Per ANGLIN, and BRODEUR, JJ.:—The protection afforded by the provisions of the "Quebec Public Health Act" cannot be invoked in favour of proceedings taken by a food inspector who has acted without exercising his independent judgment in regard to the condemnation of food as deleterious to the public health, but merely for the purpose of carrying out instructions received by him from municipal officials.

In the result of the finding of the trial Judge that the food in question was fit for human consumption (Q. R. 39 S. C. 520), being supported by evidence, was not disturbed, and the effect of the judgment appealed from (1 D. L. R. 160), was affirmed with a variation of the order making absolute the injunction against the defendant interfering therewith.

Appeal dismissed with costs.

Hon. A. W. Atwater, K.C., and *Aimé Geoffrion*, K.C.,
for the appellant.

S. L. Dale-Harris, for the respondents.

HALIFAX & SOUTH WESTERN RY. CO. v. SCHWARTZ
N.S.]

*Statute—Construction—Railway Company—Right of Way—
Combustible Materials—R. S. N. S. (1900), ch. 91, sec. 9.*

Chapter 91, sec. 9 of the Revised Statutes of Nova Scotia, 1900, provides that "where railways pass through woods the railway company shall clean from off the sides of the roadway the combustible material by careful burning at a safe time or otherwise."

Held, that this provision is imperative and obliges the company at all times to keep its right of way so clear of combustible material that it will not be a source of danger from fire. Clearing it at certain periods only is not a compliance with such provision.

DUFF, J., dissented, on the ground that it was not proved that the fire in this case originated on the right of way.

Judgment appealed from (46 N. S. Rep. 20), affirmed.

Appeal dismissed with costs.

Mellish, K.C., for appellants.

W. J. O'Hearn, for respondent.

SUPREME COURT OF ONTARIO.

APPELLATE DIVISION.

WARREN v. FORST.

Hellmuth, K.C., and *Macdonnell*, for defendant (appellant).

Arnoldi, K.C., and *D. D. Grierson* (contra.).

The defendant was the owner of certain mining stock, and desiring to obtain some financial accommodation from the plaintiffs, had certain dealings with them whereby this stock became vested in the plaintiffs; and part of the

arrangement was that the plaintiffs, stock brokers, should give to the defendant a sale-note in respect of the stock; and that the defendant should give the plaintiffs a bought-note therefor at the price agreed upon. The defendant, to complete his purchase within ninety days, with the option to do so at an earlier date.

The action was not framed as if the transaction was in substance a pledge of the stock by the defendant to the plaintiffs, but as one for damages for breach of contract on the part of the defendant in not accepting and paying for the stock. If the transaction was, in fact, a mere pledge by the defendant to the plaintiffs as security for a loan, and the action were merely to recover the deficiency arising on the sale by the plaintiffs of the stock, the questions of fact to be determined here would not have arisen. Both parties having seen fit to treat the transaction as an actual contract for the sale and purchase of the stock, we will dispose of it as if of that nature.

We think the evidence justifies the inference that the transaction was entered into between the parties on the understanding that the defendant was to give to the plaintiff twenty-four hours' notice of his exercising the option.

There is a conflict of evidence as to what notice was given, and when it was given, and we are of opinion that the notice was given on the morning of Tuesday, the 28th, and if so, the defendant had twenty-four hours, viz., until the morning of Wednesday, the 29th, in which to tender the stock. He tendered it on the afternoon of Tuesday, the 28th inst., between three and half-past three.

The defendant claims that the tender was too late, his contention being that the twenty-four hours' notice had expired at three o'clock on Tuesday.

The evidence does not, we think, support this contention on the part of the defendant. When the stock was offered to him, shortly after three o'clock on Tuesday afternoon, he refused to accept it; thereupon the plaintiff, on the following morning sold it, and gave the defendant credit for the amount realized, bringing his action for the balance by way of damages.

No attempt was made to say that the stock was not sold at its fair market value. We, therefore, think the judgment of the learned trial Judge was right, and this appeal should be dismissed with costs.

JUDICIAL ORGANIZATION IN FRANCE.

Judicial power in France is exercised by five categories of tribunals: (a) At the head, by the Court of Cassation, which sits in Paris, and which possesses jurisdiction throughout the French Republic; (b) the Courts of Appeal; (c) the tribunals of first instance; (d) the Tribunals of Commerce; (e) the *Justices de Paix*, or Small Debts or County Courts.

France is divided, from a judicial point of view, into twenty-six *circonscriptions*, each of which possesses a Court of Appeal. They are themselves divided into *arrondissements* or districts. A district possesses a Court intitled tribunal of first instance. In every town of some commercial importance there exist special tribunals, which adjudicate in all cases relating to trade. (See with regard to these tribunals, the *Law Times* of the 9th November, 1912). The district is itself divided into *cantons*, in which the judicial power is exercised by a Judge called *Juge de Paix*.

Courts of Appeal.—These Courts were officially established by the law of the 27th Ventose An VIII. and the Senatus Consult of the 28th Floréal An XII. During the French Revolution each district possessed a tribunal of first instance, but no Superior Court existed to revise their decisions. The Government at this period refused to institute any corporate body, judicial or otherwise, which could assume any political importance and become a power in the State. Accordingly, the Constitution of the 5th Fructidor An III., instead of creating Courts of Appeal, enacted that when a litigant appealed against a decision the case would be referred to another Court of first instance. Such a system was open to two objections, the first being that the appeal was dealt with by Judges of the same class, and, furthermore, conflicts between the various Courts took place very frequently. The law of the 27th Ventose An VIII. repealed the above system and created Courts of Appeal, and the said law constitutes even at the present time one of the bases of the French judicial system.

Every Court of Appeal is composed of one president, a certain number of Presidents of Chambers (or Divisions), and ten or nineteen Judges called *Conseillers*, according to the importance of the Court. A Court of Appeal is divided into Chambers, which possess the same powers in reference

to the cases brought before them, and each Chamber adjudicates separately thereon. In Paris the Court of Appeal is composed of a greater number of Judges than any other similar Court—seventy-two in all—and consists of ten Chambers. The Courts of Appeal are created to revise, when required by the parties, all judgments delivered by the tribunals of first instance or the commercial tribunals, over which they possess jurisdiction—i.e., situated within their *circonscription*. The decisions of the Courts of Appeal are not described as judgments, but as *arrets*.

Tribunals of First Instance.—These Courts are also described as being civil tribunals. Their organization consists of the following: One President, Presidents of Chambers, and a certain number of Judges and Assistant Judges, according to the importance of the Court. Similarly to the Courts of Appeal they are divided into Chambers which possess the same powers. As soon as suits are instituted in a Tribunal of First Instance the same are entered in the official list of causes pending before the said tribunal, and afterwards in the list of one of its Chambers.

The jurisdiction of these Courts is general—namely, they can adjudicate in all cases which are not specially attributed to certain particular Courts, such as the *Justices de Paix* (County Courts), the Tribunals of Commerce, and the *Conseils des Prud'hommes*, the latter of which is an inferior tribunal for the settlement of disputes between employers and the working class.

Tribunals of Commerce.—(See with regard to these tribunals the *Law Times* of the 9th November, 1912).

Justices de Paix.—These tribunals were created by a decree of the 16-24th August, 1790, to deal with actions involving small amounts. The procedure in these Courts is very simple, and the costs are infinitesimal. This jurisdiction presents two important characteristics: (a) In all the French ordinary Courts three Judges at least must be present to render a judgment. A *Juge de Paix* delivers his judgment alone. (b) He is empowered to conciliate the parties as frequently as possible.

Court of Cassation.—This Court is the highest Court existing in France. It is composed of a First President, of three Presidents of Chambers, and of Forty-five Judges or *Conseillers*. It consists of three Chambers, the *Chambre des*

Requêtes, the *Chambre Civile*, and the *Chambre Criminelle*. Fifteen Judges sit in each Chamber.

It is necessary, to understand the jurisdiction of this Court, to examine carefully the attributes of each Chamber. However, we may state before going deeper into the subject, that the questions submitted to it must be simply questions of law and never of fact.

When a final civil or commercial judgment has been rendered in any of the other Courts and is considered by one of the parties as violating the law, he is permitted to submit the question to the Court of Cassation, by means of a *pourvoi*. The case is accordingly brought before the *Chambre des Requêtes*, and its functions are to consider whether the motives invoked in the *pourvoi*, or appeal, are genuine or not. In the first case the *pourvoi* is admitted; in the second case it is rejected, and the case is definitely settled. If the *pourvoi* is admitted, the decision of the *Chambre des Requêtes* does not enter into details the result of such admission is to submit the case to the *Chambre Civile*, where a contradictory debate will take place. As a matter of fact, we may state that all questions brought before the *Chambre Civile* present either a serious presumption of the violation of the law or real difficulties as to its interpretation, for the reason that the *Chambre des Requêtes* has already examined the arguments exposed in the *pourvoi*, or appeal.

The Judges of the *Chambre Civile* may render an *arrêt* (judgments of the Court of Cassation are called *arrêts*), in two ways: (a) They may decide that the decision submitted to their appreciation does not violate any principle of the law, and that accordingly the case is finally settled, and the said decision remains in force. (b) They may also decide that the decision violates the law; consequently that it has no effect, and the parties are in the same position that they would have been if it had never been rendered.

The effect of the decision of the Court of Cassation is to declare that the law has not been respected, but it does not modify the decision appealed against. The case is sent back to be tried over again in another Court of the same jurisdiction as the one which rendered the said decision. This is the application of the principle to which we have previously alluded—i.e., that the Court of Cassation possesses jurisdiction in reference to questions of law, but never of fact; and also of the statement that in France there exists only two

degrees of jurisdiction, the first when the case is brought for the first time before a Court, and the second when one of the parties appeals against the judgment rendered. In a word, litigants may obtain relief, *primo*, before the Judges who are competent to hear the case; *secundo*, before those who can adjudicate upon appeals. No other recourse exists except an appeal to the Court of Cassation for violation of the law only. In such cases, if it be decided that as a matter of fact the law has not been respected, the Supreme Court does not decide upon the merits of the case, but refers the same to another Court of the same jurisdiction as the one which delivered the judgment appealed against.

LAW MAKING IN THE TURBULENT BALKANS.

By FELIX J. KOCH.

It is indeed a study and story in contrasts—the whence of the laws that govern the peoples of those turbulent Balkans! On the one hand, Turkey,—supposedly a limited monarchy, since the new Turk came into power—but “limited monarchy,” giving a hand in the rule to the Mussulman only, and leaving the Christian as abject a slave of the ruling Pasha as any serf of Asiatic Russia; on the other, there is Montenegro, where every man is a soldier, knows his rights, worships his ruler, and will shed his last drop of blood to enforce the laws of Csarnagora. And then there are governments betwixt and between.

For example, there is Servia. In Servia to-day the Parliament may actually make or frame or pass the laws, but the extent of their enforcement, and, after all, the source of their initiation, lies with a small clique of the military, better known as the regicides. In Servia—at the capital—you will find army officials intrusted with this or that high office of law enforcement. To-day they are uniformed and heavy with chevrons, but folks tell you their particular rise to power came through some phase of their aid toward the murder of the late King and Queen.

The tragedy was one which shocked Europe. A King, a Queen, a Minister of State, a servant or two, murdered in the night in truly Macbethan fashion, and the bodies tossed

through the palace windows into the streets, in order that any and all might see and so quiet all doubts as to their actual extinction.

You or I may hold up our hands aghast, but the Serbs are really a law-abiding folk, and they tell another story. In order to produce a like reign of law, they state, it took the entire French Revolution to do, in France, what the murder of five people did in Serbia.

Queen Draga, of Serbia, was a known harlot, and the women of the Serb aristocracy refused to associate with her. She took out her revenge, through the King, on their husbands. Men were refused promotions or even lowered in rank on slightest pretext. The most dissolute characters were advanced over their heads. Serbia was in foment—and then it happened.

Had they merely exiled the King or even the Queen there would always have been a party, looking, of course, to advancement under the Restoration, striving to bring them back. That would have been one cause of perpetual discord.

Wherefore — the murder; and to-day little Serbia is indeed a law-abiding land. So eager are the people to keep the law that a stranger, in the smaller towns, is spied on by all—lest he do mischief; and in our own case we were arrested, on their complaint, for no worse a crime than taking color notes of a wedding procession on the highway. We might have been sketching the military road, you see, and so bringing harm to Serbia.

In Turkey, as suggested, the pendulum swings the other way. Whatsoever the mock Parliament at Constantinople may do, the Sultan, his viziers, and, under them, the Valis, or province governors, really rule about as they see fit. The final unit—the county—as it were, in Turkey, has its law enforcement left in the hands of a Pasha, who has, in most places, power of life and death.

The Pashalik, his official residence, is the finest structure in the county. At its rear is a verandah, on which he sits to listen to the military band, which plays when the notion may seize him. Across from that seat of state is the administration building—its lower floor the prison, where the offenders against the law are incarcerated.

Strange place, that prison. The bars open directly on the court, and so prisoners enjoy all the benefits of fair

weather. But when it rains, it rains into the prison; when it snows, in the Sandchak uplands—it snows into the prison. People of the town take it as a deed of charity to step to the bars ever so often and feed the prisoners, as you or I might some pet bear at the Zoo. Within the prison wall there is just one huge cell, and whether you be guilty of blaspheming the prophet, or whether you have killed a Mussulman and are awaiting death sentence, you are in one and the same “box.”

The origin of much of the lawbreaking in the Empire is, of course, the abominable tax system. Taxes are meted out from above. The Sultan tells the Vali, say of the province of Adrianople, that he must yield so much tax this year. The Vali adds a proportionate amount to pay himself, maintain his court, and then divides that sum among the district governors. Each is advised that his district must yield so much this year. This petty autocrat adds his own salary and squeeze, and then divides the amount among the county rulers. And they—

Well, instead of making a tax valuation, and then having it collected, they employ publicans. Men bid, each year, for the taxes of the given county. The one who pays the Pasha the largest amount is, of course, the winner. He pledges to pay the Pasha, at the close of the harvest, so many thousand *medschidje*. To help him get it, all the military, all the authority of the Porte, is invoked.

He comes to so-and-so, who's been raising millet, let us say—and demands his tithe—for the tenth is the great tax of the region. The peasant complains that the measure is bulged; the tithe unfair. Well and good, the publican will send to Constantinople for another—meantime he'll collect elsewhere. And meantime — which is going to be weary weeks—the peasant's millet is ripe for the harvest, ripe for the granary. Storms drench it, it is rotting away, but not a blade may be harvested until the Sultan's tenth is gone. The peasant stands to lose all his crop, and his friends deride him for his folly. When, in due course, the “new” measure arrives, the law allows the publican to take the equal of the original tithe out of the remainder that may be unspoiled.

Then there's another law that does havoc to the Christian. This is that it is not perjury for a Moslem to swear falsely against the infidel. Nor is it sin for a Moslem to

break the most solemn oath given a Christian; which means that any number of crimes can be committed against the Christians, and their Moslem perpetrators blandly swear they know nothing about them. Just for example, there is a law which requires every Moslem to serve five years in the armies of the Sultan. Christians, instead, are forced by law to pay a so-called war-tax. *Backsheesh* will free many of them from this; but one must know how to apply it. Every male, from the year of birth up to the age of eighteen, pays a matter of 83 cents—four days' earnings of a full-bodied peasant—as this tax. If such child die, though, for a year or more after, the Christian must pay the tax; for the authorities purposely delay filling out the death certificate, and the publican will take no one's word that the child is dead—professing to believe him off in hiding.

In contrast to this reign of autocratic law is the freedom and ease of the Bulgarian. Notably since Ferdinand has thrown off the Turkish vassalage has the little upland kingdom prospered.

Its laws are modern indeed—and the place of their making bespeaks the tastes of the law-makers.

Travellers on the Oriental Express, dropping off at Sofia make a visit always to the Sobranje, or capitol building. The building is a two-story one, the exterior coated with the yellow plastering so common in the region, and bearing no evidence of graft in its erection. Just opposite is a splendid equestrian statue of Alexander II., erected by Russia as a gift to the land.

The centre front of this building protrudes a trifle, and, with a shield set on its top, it adds certain strength to the whole. One enters through this fore hall, neatly white-plastered, into another corridor, serving as hat room. It seems strange that national Parliament Buildings should maintain so primitive a cloak arrangement as this.

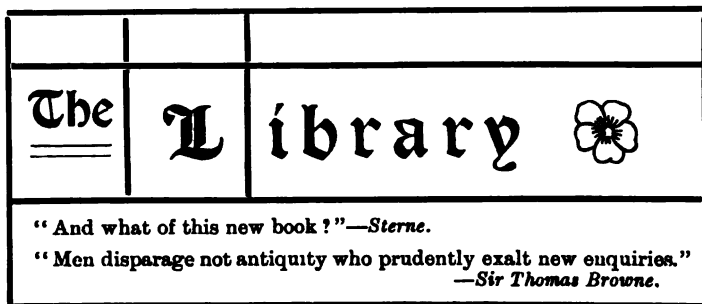
From that hall you continue into the main Parliament chamber—of course, a good-sized room that. At right and left is a balcony, part of the space beneath it walled off. At the centre, the chairs of the members are grouped, leading on to the rostrum. The effect of the room is white, with panels of a pale cream, richly adorned with decorations in gold for relief.

A door, at the rear of the Parliament chamber, admits into the library, a large, square room as well, lined with

innumerable small, separate bookcases. Here, in the summer, when the Sobranje is overhauled, are stored the pew-like seats of the law-makers—each a bench divided into seats, and having at its rear the desk for the persons behind. Evidently lawmakers, the world over, are much the same—nations provide libraries, but lawmakers don't use them, and between sessions the books gather dust.

At the rear of the library there's a bar and a lunch room; from these you go into the hall, that leads away to a newspaper room, racks of the papers on the bamboo splints, hanging on every wall. Three green-baized topped tables are crowded with weeklies—while from the walls two paintings of Czar Ferdinand look down on a floor of plain offices.

Round about here are side rooms devoted to offices, plain in their furnishings. A stair at the rear leads upstairs into another corridor, with more offices, that ends at a reception chamber. Paintings on the walls, chairs of neat upholstery, a throne—in case of necessity—shew the Bulgars to be able to put on appearance where and when they feel needful. And in the room for the stenographers, near by, a typist at work on a design for a menu, the whole done in signs used in shorthand—shew that these men have perception of the artistic. For simplicity this House of Parliament commends itself—it marks one extreme of the Balkan capitols. In Cetigne they have a still simpler structure.



Canadian Reports, Appeal Cases. Arranged, annotated and edited by Walter Edwin Lear, Esq., of Osgoode Hall, Barrister-at-Law. Arthur Poole & Co., Law Publishers, Toronto.

This series of reports published by Arthur Poole & Co., and edited by Mr. Lear consists of appeals allowed or refused by the Judicial Committee of the Privy Council on appeal from the Dominion of Canada. The cases have been collected from the various English reports and are now for the first time presented in a convenient series which will enable counsel to not only look up any point decided in any particular case by the Privy Council, but he will find various cases to which reference is made and also to cases, if any, upon which the Privy Council's judgment is based. Each particular case in the Canadian Reports is first set out in a syllabus, then a statement of the case is given followed by the judgment at the trial, the judgment of the Court of Appeal and the Supreme Court. The full argument in the case before the Privy Council setting forth the points involved is in turn followed by the Privy Council's judgment. It will readily be seen that decisions of the Judicial Committee of the Privy Council presented in this form must of necessity be a great boon to solicitor and counsel alike in that all Canadian appeals, including those in Newfoundland, are published in this series and the amount of time and nervous energy which these books of reference will save is incalculable,—in addition to which owing to the fact that the knowledge that the law on a certain subject is to be found in compact form will mean much to Bench and Bar alike.

The reports are not yet quite complete, there being a portion of one volume still lacking, but the nine volumes already issued are a great addition to any library, and both

editor and publisher are to be commended for their work and enterprise in issuing so valuable and complete a series.

Students Leading Cases and Statutes on International Law. Arranged and edited with notes by Norman Bentwich of Lincoln's Inn, Barrister-at-Law, with an introductory note by Professor L. Oppenheim, Whewell Professor of International Law at the University of Cambridge. Sweet & Maxwell, Ltd., London. 12s. 6d.

Essentially a book for students. This handy volume will be of material assistance to those who are beginning their study of international law, and should be of material assistance not only in the preparation for examinations but in imparting a knowledge of this most important subject. The book is divided into two parts,—part 1. "The Law of Peace," and part 2. "The Law of War," and the principles set out in the different chapters under these sub-divisions are made much more interesting by being presented in concrete form by the aid of the principal cases to which the chapters refer, in addition to which, instead of a summary of the cases being given, the very words of the Judges setting forth the principles in each case are quoted, thus making the book a valuable one.

Chitty's Statutes of Practical Utility. Containing Statutes passed in 1912, down to March, 1913. By W. H. Aggs, M.A., LL.M., of the Inner Temple, Barrister-at-Law. Sweet & Maxwell, Ltd., 3 Chancery Lane, London; Stevens & Sons, Ltd., 119 and 120 Chancery Lane; Carswell & Co., Toronto.

This work is too well known to need much comment, but a mention of some of the Statutes passed will undoubtedly be of interest, especially the Aerial Navigation Act, 2-3 Geo. V. ch. 22, 1913; the Criminal Law Amendment Act of 1912, 2-3 Geo. V. ch. 20, which will undoubtedly be of great importance to the members of the Bar in Canada, and the Pilotage Act, 2-3 Geo. V. ch. 21.

Outlines of Procedure in an Action in the King's Bench Division. By A. M. Wilshire, M.A., LL.B., of Gray's Inn and the Western Circuit, Barrister-at-Law. Sweet & Maxwell, Ltd., London, 7s. 6d. Carswell Publishing Co., Toronto. \$2.00.

This, as the author states, is a book for students and should be of great assistance to them in obtaining a know-

ledge of the rules of procedure in litigation. Much time is often lost by a lack of knowledge as to the proper procedure to take at a particular juncture in a pending action, and much time is also lost either through inability to obtain the necessary information of how to proceed or on account of reluctance on the part of the student to make inquiry for fear his lack of knowledge may tell against him with his firm. This handy volume will be found a ready reference in cases of doubt, and should on that account be much in demand.

A Handbook of English Law Reports from the last quarter of the 18th century to the year 1865. By J. C. Fox, a Master of the Supreme Court, Chancery Division. Part 1, House of Lords, Privy Council, and Chancery Reports. Butterworth & Co., London.

Without reservation it can be said this book supplies a long existing want. It is not difficult to look up a case when you have the citation and are able to refer to the abbreviated names of the reports, and no volume will be in greater demand than the present one so soon as its publication is known to the members of the Canadian Bar who find it necessary to constantly consult the English Reports.

Leading Cases in Workmen's Compensation. By G. N. W. Thomas, M.B., Ch. B., of the Middle Temple, Barrister-at-Law. Butterworth & Co., London.

With workmen's compensation as a theme for discussion in practically every country in the world, especially Great Britain, Canada and the United States, the present volume appears at a very opportune time.

Under the various headings such as "What is an accident?" "Statements of a deceased person," "Did the accident arise out of and in the course of the employment?" "Misconduct of workman," "Negligence of fellow-workmen," &c., the principles of labour involved are ably set forth and the leading cases governing each point are given. The book will be found one of the most useful of recent publications to the practitioner and one which he will find of great assistance in looking up a point involved in this very often difficult subject.

Spouse Witnesses in Criminal Cases. By Herman Cohen, Esq., of the Inner Temple, Barrister-at-Law. Stevens & Haynes, Law Publishers, Bell Yard, Temple Bar, London. 1s. 6d. net.

This little pamphlet discusses and sets forth the law on this subject in concrete form, stress being laid on the competence and compellability of spouse witnesses both in prosecution and for the defence in criminal cases. The discussion of these points will aid much in the interpretation of difficult passages in the criminal statutes.

Justice and the Modern Law. By Everett V. Abbot, of the Bar of the City of New York. Houghton Muffin Co., Boston and New York; Carswell Publishing Co., Toronto.

This able work is a dissertation upon the approximation of modern law to the ideal of justice. In the introduction, the author, in the opening sentence, states "If the law were suddenly to be administered as it actually is, the people would receive justice—but they would be shocked. They would enter upon the enjoyment of unaccustomed rights, and would find themselves relieved from long-accustomed burdens,—but, until habited to their new privileges, they would believe that the foundations of the Government were being unsettled."

In answer to an inquiry why the ideal of justice is not actually attained the author states as the reason that we are heirs of ancient views and customs which must first be corrected and the proper method of correction has not yet been learned, that there is fear of a change in the established order and the people fall into sophistry when the point is approached at which the application of accepted principles develops unexpected or undesired results. "As between a justice which would overturn many existing institutions, and a sophistry which preserves them, sophistry is chosen."

In discussing the ethical principles of law, one chapter is devoted to "The Law as it is Practised," a second to "The Law as it is Administered," and another to "The Principle of Sufficient Reason," that is to say, any case which comes before the Courts for their judicial decision must be decided upon rationally sufficient reason.

In conclusion, the author believes that the time has come for an ideal system of justice and that the injury inflicted in bringing this about would be infinitely less than the good results achieved.

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THE JUDICIAL COMMITTEE.

REX V. THE ALBERTA RAILWAY AND IRRIGATION COMPANY.

Authorized by its charter; by the permission of the Commissioner of Works of the North West Territories; and by the license of the Minister of the Interior, the company (prior to August 1900), constructed its canals across certain "road allowances" in a locality then within the North West Territories. Afterwards, it was desired by the Alberta Government that these road allowances should become public highways. And the question was whether the company was bound to build and maintain the necessary bridges.

The obligation was said to rest upon two grounds: (1) implied common law liability; and (2) express agreement between the company and the Commissioner of Public Works.

The Alberta Court (proceeding upon the first of these grounds), held that the road allowances were in reality roads; that the authority of the company was subject to the implied condition that bridges should be built (citing three English cases); and decided, therefore, against the company.

In the Supreme Court Davies, Duff, and Anglin, JJ., in view of the existence of special statutory provisions regulating the liability of the company, held that the alleged liability could not be implied. The Chief Justice and Idington, J., were of contrary opinion.

In the Privy Council, senior counsel for the King contended that the allowances were really highways and that the English cases applied; afterwards he spoke of them as "potential highways" (and counsel for the company accepted the phrase); but upon the whole he found that he

could make nothing of his assertion of an implied liability. At one stage of the argument Lord Dunedin said:—

“I quite understand your not wishing to give up the point, but I see a certain difficulty in your extreme argument; supposing they are highways, it is perfectly clear from these statutes that they give power to the Commissioner to cross them. Supposing they were highways, then it does not say anything about there being a necessary bridge; it seems to me that the Act of Parliament would override the public right, whatever it was. It really helps you in the second argument, namely, of terms, and what are the terms inherent; but apart from the terms it is a little difficult to see if they were highways when the Act of Parliament says the Commissioner shall have the right to give you the power to cross these whether that would put it in his power if he liked to put you across even without putting up a bridge.”

Counsel persisted in the argument, contending that under the statute the Commissioner could not dispense with the implied liability to construct bridges, but Lord Dunedin again interrupted, and the following colloquy ensued:—

“Lord Dunedin: That is a much more difficult position for you; and, observe, unless you absolutely conquer that very difficult position then it does not matter because the moment that you have to surrender, if you have to surrender, that extreme position, then it entirely comes to: What terms has he given?”

“Mr. Lafleur: Clearly, my lord, and I am content really to rest my case on that.

“Lord Dunedin: Rightly or wrongly one understands your position; that you do not like to say you will give up the other.

“Mr. Lafleur: It has impressed some of the Judges below so strongly that I concluded there must be a good deal to be said in its favour, and I am impressed with the idea that even if these were not highways they were intended to be highways or land set apart for highways; and at the same time there ought to be no greater right of obstructing these permanently than there would be of obstructing highways; the only thing being the time at which the bridges should be built.”

Senior counsel for the King having thus expressed his willingness to rest his case on the question of the terms imposed by the Commissioner—upon the question of contract.

junior counsel for the King did not pursue the argument in support of an implied liability.

Senior counsel for the company referred to the point in opening. He said:—

“I may take that point first, because it is most convenient. I submit that the Courts in Alberta were quite wrong in deciding, as all of them did, on the authority of the English cases as to the liability of a company or an individual who, under statutory power, had removed a highway at a particular point, had interrupted a highway at a particular point to put the bridge.

“Lord Dunedin: I do not think those cases have anything to do with it, because they were all maintenance cases.

“Sir Robert Finlay: And yet it is upon the supposed applicability of those cases that all the judgments in the Courts of Alberta in my friend’s favour proceed. I will not deal with them after what your Lordship has said.”

Counsel then proceeded to shew that allowances for roads were not roads, and, therefore that, for that reason also, the cases could not apply. Counsel for the King had left little for him to do, and after some references to the statutes, believing the Committee to be with him, he said:—

“Sir Robert Finlay: As I understand, your Lordships do not desire that I should go through the other statutes dealing with road allowances as distinguished from roads. I am prepared to do so, if your Lordships desire it.

“The Lord Chancellor: I think we have enough in our minds with regard to that.”

That was the last that was said upon this first point of the King’s case—the existence of an implied obligation. If not actually given up by counsel for the King, their Lordships had sufficiently indicated their disagreement with it. The rest of the argument was devoted to the second contention—the existence of an express agreement, Lord Dunedin saying to Sir Robert Finlay:—

“That is, as I understand, the contention against you.”

And counsel saying:—

“The case is now based on contract. It is said there was a contract. There is not a word in the statement of claim about anything of the kind. The statement of claim is based entirely upon the common law liability which forms the basis of the judgment in the Court of Alberta.”

Into the merits of this contention, I do not propose to enter. I leave it alone, not because I agree with their Lordships' decision or even believe that it can be sustained in argument, but because I desire to direct attention solely to the ground upon which the decision against the company rested. Their Lordships said:—

“The company has power under the Irrigation Act to construct ‘bridges.’ The word ‘bridges,’ in that connection, must mean ‘bridges’ over the company’s canals where they interfere with roads or road allowances. The construction of the necessary bridges is, therefore, one of the purposes of the company’s undertaking. It follows that the stipulation about building the necessary bridges, to which the company submitted on the original application, is nothing more than a stipulation binding the company to do, as a matter of contract, what it would have been bound to do if there had been no submission.”

That is all that their Lordships say. To the apparently overwhelming arguments against this construction of the documents no reply is made; and of the reason for the inacceptability of those arguments no explanation is offered. Respectfully, I submit the following criticisms of what their Lordships have said:—

1. From the fact that a company had statutory authority to make a certain class of contracts, no Judge in Canada, high or low—no Justice of the Peace, would argue that the company had actually entered into a particular contract within that class.

2. No such argument was offered at the bar. No counsel would have dared to suggest it.

3. Their Lordships fell into curious error when they said that “the company has power under the Irrigation Act to construct bridges,” and when they gave a certain interpretation to the word “bridges” as used “in that connection.” For the indisputable facts are:—

- (a) The company’s power is not in the Irrigation Act at all. It is in the company’s charter.

- (b) The word “bridges” appears three times in the Irrigation Act; and at no place can it bear the confined interpretation put upon it by their Lordships. That, however, is immaterial, for the Act is one of general application, and,

therefore, has no bearing upon "the purpose of the company's undertaking."¹

(c) In the company's charter (where alone may be found "the purpose of the company's undertaking") the word "bridges" does not occur. And the only power to construct bridges which the company had was included, by implication, in the power "to construct, maintain and operate irrigation ditches or canals."

4. Their Lordships, therefore, founded their judgment upon the purposes of the company's undertaking as shewn in a statute which has no relation to those purposes; and upon the meaning of a particular word which actually does not occur in the only statute that does relate to those purposes.

5. When their Lordships said that the documents bound "the company to do, as a matter of contract, what they would otherwise have been bound to do," they forgot that that view, if not actually abandoned at the argument, was, by the Committee itself thought to be insupportable, and that, for that reason, counsel attacking it were practically stopped.

6. These criticisms are reducible to three: (1) Their Lordships proceeded upon a wrong notion of the derivation of the company's power; and upon their interpretation of a word which does not occur in the right statute. (2) Their Lordships proceeded upon a view of the law that, at the argument, was deemed by their Lordships to be insupportable, and, for that reason, was not fully argued. (3) Their Lordships were under the impression that because the building of bridges was "one of the purposes of the company's undertakings," it followed that certain ambiguous documents contained a contract to build certain specified bridges.

Can anyone be surprised if clients and counsel are not perfectly satisfied with a Court which disposes, in this careless and indifferent way, of interests involving hundreds of thousands of dollars—involving the erection of scores of bridges and their maintenance for all future time?

JOHN S. EWART.

¹ The word appears in secs. 2 (g), 11 (d), and 37 of 61 Vic. (Dom.) c. 35.

FELO DE SE.

A bill introduced some time ago in the legislature of Nevada spread a ripple of ethical controversy over the Union. It provided that any person condemned to capital punishment might have the option of being hanged or of swallowing a dose of cyanide of potash—a poison producing instantaneous death. Although execution by the electric chair is also immediate and painless, the method by poison would probably be less harrowing because it requires no elaborate mechanical preliminaries. The proposal is, however, inexpedient because the private scruples of some individuals, after repentance and preparation for death, would limit them to the old barbarous form. Moreover, much criticism has appeared in professional as well as secular journals, against countenancing suicide under any circumstances, and this in turn, has been met by the contention that no moral quality is involved in taking one's own life under quasi-compulsion. It is improbable that such a measure will be adopted but its mere suggestion is significant of relaxation of the sentiment that suicide is inherently and necessarily an act of turpitude.

It may be proper to require that the captain of a vessel that has met with disaster shall be the last person to abandon her. The extension of the rule, however, into moral compulsion that a commander shall actually go down with his ship is ghoulish, utterly futile cruelty. Such an unwritten law, materially influential in the twentieth century, is at once as childish and as infamous as the English law of Court Martial of the Eighteenth Century which enabled an incompetent and negligent Government to put Admiral Byng to death as its scapegoat. The number of persons is not inconsiderable who seriously adopt the spirit of Punch's suggestion to carry a director on the cowcatcher of a locomotive, and believe that vigilance for maritime safety demands that a captain shall have no hope of personal escape in the event of loss. Even though others stop short of commending suicide as a sensational seal of fidelity, their attitude is different only in degree in insisting that a commander who, though faultless, has been unfortunate, shall not be put in charge of another ship, but must close his career. This inexorable policy has, indeed, driven many

captains, whose vessel after stranding or collision were kept afloat, to escape from the future by blowing out their brains. Although the unwritten law now happily is weakening, it has been notable as embodying a special dispensation for the sin of taking one's own life.

In her book, "Boots and Saddles," Mrs. Custer, speaking of journeys made by her in regions infested by hostile Indians, says:

"I had been a subject of conversation among the officers, being the only woman who, as a rule, followed the regiment, and, without discussing it much in my presence, the universal understanding was that any one having me in charge in an emergency where there was imminent danger of my capture should shoot me instantly. While I knew that I was defended by strong hands and brave hearts, the thought of the double danger always flashed into my mind when we were in jeopardy."

If she had thus been killed, while her slayer would have been technically guilty of murder, it is doubtful if in the event of his own rescue he would have been convicted by a jury. If the officer in command had himself been slain or disabled, and she had killed herself, few would have been so fanatical as to attach a stain to her memory.

Incurring great danger to save another from injury or death has always been deemed honorable. The law exonerates persons so risking life or limb from ordinary liability for contributory negligence. Ethical criticism was not passed upon Dickens' "Tale of Two Cities" because of Sydney Carton's virtual suicide in order to preserve Charles Darnay. Must sacrifice, although heroic and illustrious if for the benefit of a friend or even a stranger, be uncompromisingly banned for his own release from prolongation of torture by one afflicted with an incurable disease? The sentiment of the medical profession is against euthanasia, though physicians may wink at the incidental shortening of existence through copious administration of anodynes. Objection to the legitimacy of the same relief for a human being that would be accorded to a beloved animal is founded in part upon the danger of practical abuse. If euthanasia ever be sanctioned by law, public safety will require that it be practiced only under the superintendence of public medical officers and with the consent of the patient.

Otherwise the way would be altogether too conveniently open for the murderer with a professional accomplice.

Sir Thomas More in his "Utopia" portrays the priests of the imaginary community as decreeing that persons incurably diseased may kill themselves, but condemning the memory of those who did so without official sanction. It is not improbable that in time the substance of this policy will become the rule of the civilized world.

It is significant that a person of such profound and, in the main, such conservative religious convictions as Dr. Wilfred T. Grenfell admits that prolongation of the lives of suffering incurables is "altogether undesirable," saying that he had tiptoed past the bed of such an one to avoid the pain of having to refuse a "lethal draught" for which he piteously prayed. ("The Adventure of Life," Harvard Noble Lectures, 1911, p. 44.)¹

Outside of the possibilities of perversion, and even among physicians themselves, opposition to euthanasia rests upon the emotional horror at suicide *per se* which has possessed the Christian mind for centuries. It pervades the Mohammedan mind, also, because, under the borrowing and adaptive tendency of all religions, the Koran incorporated the prohibition of suicide from the teachings of Christian theologians. It is well known, however, that among Pagans self-destruction involved no idea of moral guilt but was regarded as permissible and, under some circumstances, praiseworthy. Cato, the Younger, one of the most illustrious of suicides, before committing the act, strikingly discoursed in justification of the right "to set himself at liberty." His view has been accepted by all peoples and sects that have not felt the influence of Christianity. It will probably come as a surprise to many to learn that even the Christian attitude is extra-Biblical, there not being contained in either the Old or the New Testament a word in condemnation of suicide.

The subject has been elaborately treated by Lecky in his History of European Morals, who shews that the "Christian theologians introduced into the sphere we are consid-

¹ Since this article went to press American newspapers have contained notices of the recent publication of a book by the Belgian poet, Maurice Maeterlinck, to which the present writer has not had access, but which would seem to present an elaborate and forceful argument at least against artificial prolongation of life if not actually in favour of euthanasia.

ering new elements both of terrorism and of persuasion, which have had a decisive influence upon the judgment of mankind. They carried the doctrine of the sanctity of human life to such a point that they maintained dogmatically that a man who destroys his own life has committed a crime similar both in kind and magnitude to that of an ordinary murderer, and they at the same time gave a new character to death by their doctrines concerning its penal nature and concerning the future destinies of the soul." (Vol. 2, p. 45.) This author gives many illustrations and others from American soil may be added by readers of the history of the Jesuits in North America, graphically narrated by Parkman. As missionaries to the Indians, many priests of that order were put to death by lingering torture, and without the strongest arbitrary scruples this liability would unquestionably have led to many suicides.

The theological attitude was naturally at an early period embodied in the law of England making suicide "a peculiar species of felony," punishable by burial in the highway, with a stake driven through the body, and forfeiture of the felon's goods and chattels, "hoping," as Blackstone says, "that his care for either his own reputation or the welfare of his family would be some motive to restrain him from so desperate and wicked an act."

According to the modern conception the suicide himself is pitiable rather than reprehensible, and, of course, punishment cannot reach him, but only innocent persons who suffer vicariously. Indignity to his remains and attainder of his property, and in many communities the theoretical criminality of the act itself, have long been abrogated. The law should, however, punish most severely an aider and abettor of suicide, who, as he profits or escapes loss through indirectly causing another's death, is substantially guilty of murder.

In England, as suicide was suffered to retain its status as a crime, and as, according to technical rules, accessories could not be tried before the principal, the former escaped. This anomaly was obviated by a statute passed early in the reign of Victoria, providing that one who persuades or abets another to commit suicide may be convicted as a principal in the second degree, or an accessory. In some of the American States, either the law upon abetting suicide is uncertain and difficult to administer, or there is no law at

all. An Appellate Court of at least one State has said that "the suicide is innocent; therefore the party who furnishes the means to the suicide must also be innocent of violating the law." Such a ruling is a gross miscarriage of justice and the obvious remedy is one that has been adopted in New York and Missouri which, entirely ignoring the suicide's act, constitutes abetting suicide and abetting attempts at suicide independent crimes, carrying condign punishment.

It is believed that the law may properly and efficaciously go one step further and, again ignoring consummated suicide, take cognizance of an attempt at suicide, not indeed as a criminal offence, punishable by fine or lengthy term of imprisonment, but under the general police power of the State. Lecky contends, with substantial Cantonism: "Suicide is indeed one of those acts which may be condemned by moralists as a sin, but which, in modern times, at least, cannot be regarded as within the legitimate sphere of law; for a society which accords to its members perfect liberty of emigration cannot reasonably pronounce the simple renunciation of life to be an offense against itself." If suicide were usually committed by persons in normal mental and physical condition, after mature deliberation, it would be difficult to answer Cato's and Lecky's reasoning. In very many cases, however, one destroys his life from impulse, or because of a mood of discouragement or remorse, or through intoxication or some similar temporary cause. Thousands of men and women, after having unsuccessfully attempted suicide, have passed long and useful lives.

Except in instances of suicidal paranoia, a disease distinctly classified by alienists, the liberty of a would-be suicide cannot be interfered with on the ground of mental incapacity. Some writers and a few Judges have held that suicide is itself presumptive proof of insanity—an assumption abundantly refuted by every-day observation.

Nevertheless, the preservation of the public health—and under this may be included the prolongation of life and the prevention of death—is the most important and the commonest sphere of exercise of the State's police power. The present writer is of opinion that, as guardian of public health and life, the State may legitimately take temporary custody of persons who have attempted, and are therefore presumably still contemplating, self-destruction. If physical disease, or financial distress, or fear of disgrace has

precipitated an attempt at suicide, medical treatment or charitable aid, or the sympathy and encouragement of friends may reconcile the unfortunate to facing life again. It may be of very substantial utility to have authority forcibly to restrain him from repeating his attempt until after these outside influences shall have been brought to bear, and the normal love of life shall have had opportunity to reassert itself.

The State of New York has a law making an attempt at suicide a crime punishable by fine or imprisonment. Its theory is wrong, as the modern policy of penal legislation is not revenge but the prevention of future crime, and it is plain that punishing an attempter would not discourage others from similar attempts, or even deter a second attempt by the same person. These considerations, combined doubtless with a sense of the weight of Cato's and Lecky's argument, have rendered the statute unenforceable. Many cases have been held by magistrates for grand juries, with the uniform result of refusal to find an indictment and dismissal of the proceedings. But it is probable that this New York law, notwithstanding its anomalous form, by authorizing the temporary detention of persons, has in many cases accomplished just the practical result at which any provision of the kind should directly aim.

One who attempts suicide should be classed not as a criminal, but as merely amenable to temporary deprivation of liberty. He should be made subject to restraint in the discretion of a magistrate not exceeding a brief, definite period. Even extreme advocates of the view of Cato and Lecky ought to be reconciled to legislation of such limited scope, which probably would be instrumental in saving many lives, because the way can never be closed, even though it be temporarily blocked, against one who is calmly determined upon quitting the world.

Comparatively little, however, can be accomplished by positive law. Lecky is correct in the view that the discouragement of suicide falls mainly within the province of religion and ethics. It is certainly one of the most remarkable phenomena in the evolution of morality that, during long ages when the killing of other persons in war, in duels, or even by assassination was regarded as venial, the Christian Church succeeded, without express Biblical authority, in classing the taking of one's own life as an unpardonable

sin. The anomaly and injustice of the distinction are obvious, and Lecky shews that even under Christianity there was a strong tendency to excuse, and thereby indirectly countenance, suicide by women in order to escape violation of their chastity.

Lecky has said that "the doctrine of suicide was indeed the culminating point of Roman stoicism. The proud, self-reliant, unbending character of the philosopher could only be sustained when he felt that he had a sure refuge against the extreme forms of suffering or despair." We may concede the legitimacy of the doctrine as applying to cases of hopeless physical ailment and suffering, although not to the domain of merely mental distress.

Christianity out-stoicised the Stoics and, notwithstanding fanatical extremes and abuses, the morale of modern civilization owes much to the arbitrary dogma. The church was building better than it knew, ingraining a sentiment that has been of prime importance in social evolution. Instead of the liberty to quit when worsted and despairing, there was substituted a dictate of conscience, and incidentally of pride, that one must still struggle on, ignoring personal consequences and immediate results, with faith in the great result that some day must be achieved.

Much has been eloquently written, both by the Roman Stoics and by moderns, in praise or extenuation of suicide. The merit of this literature is merely rhetorical, consisting as it does of variations upon the trite theme that a man may do as he wills with his own and that nothing is more essentially his own than his life. Illogical, begging the whole question, perhaps, but instinct with the very soul of modern evolution are the words of one who, by a lifetime of physical suffering and indomitable achievement, had earned the right to speak:

"The ship rides trimmed, and from the eternal shore
Thou hearest airy voices; but not yet
Depart, my soul, not yet awhile depart.
Freedom is far, rest far. Thou art with life
Too closely woven, nerve with nerve entwined;
Service still craving service, love for love.
Love for dear love, still suppliant with tears.
Alas, not yet thy human task is done!
A bond at birth is forged; a debt doth lie
Immortal on mortality. It grows—
By vast rebound it grows, unceasing growth;
Gift upon gift, alms upon alms, upreared,
From man, from God, from Nature, till the soul
At that so huge indulgence stands amazed.
Leave not my soul, the unfoughten field, nor leave

Thy debts dishonored, nor thy place desert
Without due service rendered. For thy life,
Up, Spirit, and defend that fort of clay,
Thy body, now beleaguered; whether soon
Or late she fall; whether to-day thy friends
Bewail thee dead, or, after years, a man
Grown old in honor and the friend of peace.
Contend, my soul, for moments and for hours."

As Robert Louis Stevenson thus voiced the enthusiasm of struggle and endurance to the bitter end—a spirit different alike from the passionless brooding of Nirvana and the proud resignation of Seneca and Cato—Arthur Hugh Clough sounded the concomitant modern note of faith:

"If hopes were dupes, fears may be liars;
It may be, in yon smoke concealed,
Your comrades chase e'n now and fiers,
And, but for you, possess the field.

For while the tired waves, vainly breaking,
Seem here no painful inch to gain,
Far back, through creeks and inlets making,
Comes silent, flooding in, the main!"

The complexity and the strain of modern life conduce to the increase of suicide. For the conservation of the Christian tradition for the utilitarian good there is in it, many practical suggestions occur. Two of the more important may briefly be mentioned.

There is no more tragic lot in the modern world than that of Jean Valjean, because of its inhuman ostracism, and because it affects only comparatively few whom the law is successful in making examples of, while others, of equal moral guilt but who are shrewder, or wealthier, escape. The policy of indeterminate sentence of criminals should further evolve the social rehabilitation of repentant convicts. Under arbitrary standards now prevailing the only alternatives offered to many a normal person who has made a mis-step under grave temptation is a life-long incognito, confirmed criminality, or suicide.

It is probable that the real cause of many suicides is simple ennui. Some unfortunate strait, emotional or financial, may offer the occasion, but underlying is a feeling of slow growth that the game is no longer worth the candle. Suicides of this class are apt to be past middle life and to be childless.

If many lives have proved worth living to their normal close after an extraordinary gift is as dead as if it had belonged to another person, certainly a life that has never

known the zest of the exercise of genius may still find happiness, notwithstanding disillusionment and emotional letting down. The late E. P. Whipple in his essay on Wordsworth pointed out that in a revision of his works published late in his life there was omitted from the poem, "Louisa," a delicate conceit that her smiles as they passed away

"Are hidden in her eyes."

The critic was doubtless right in suggesting a loss of power on the poet's part to perceive the beauty of the line, and it may be taken as typical of the atrophy of fancy and sentiment, when "youth, the dream departs" and "takes something from our hearts," that "never comes again." Lyrical poetry and certain forms of fanciful and sentimental prose are essentially an expression of the vividness and intensity of early years. There are of course exceptional poets and exceptional moments of aged poets. But as a rule it is better to cease production, not, as Rossini is said to have done, from sheer laziness, but, as Thomas Bailey Aldrich did, from self-knowledge and self-control. If Donald G. Mitchell could fill out contented and useful years, though the basis of his permanent fame had long gone out, the suicidal ennui of an average person is at least aggravated egoism, even though the deed do not amount to cowardice through running away from definite responsibility or duty.

WILBUR LARREMORE.

New York City.

CONSIDERATION AND MOTIVE AS ESSENTIALS
TO A BINDING AGREEMENT.

In business circles a strong sentiment prevails that an agreement once entered into and expressed in due form should be binding without any consideration being given or received therefor. The giving of a nominal consideration for the purpose of legalizing a promise is not favourably received. It impresses the average man as archaic. And on whether or not this notion is correct, depends the future of the doctrine of consideration.

The doctrine has more than once been subjected to criticism, and its right to existence has been questioned. Its historical and theoretical significance have been ably examined but its merits and demerits from a practical standpoint have been neglected. It is the opinion of the writer that the common-law doctrine of consideration, viewed in connection with motive is a living force in the law of contracts and has proved itself superior to all other known methods of evidencing an intention to enter into a legally enforceable agreement.

At the outset it is important to distinguish between moral obligations and legal obligations. All promises should be fulfilled but this does not imply that the law should enforce them. A promissory note should be paid even though no value was given for it. But payment should not be compelled by law even though the opinion and practices of the business world are to the contrary. A naked promise, even when in the form of a writing is not a proper subject for legal sanction.

It is an every day event for some one person to desire to become legally obligated to another for a sum of money; for which obligation such person wants, and will take nothing in return. Accordingly he writes out and signs a promise to pay, which he delivers to the other; and thereupon all goes well until the promisor begins to weary of his promise, and declines to pay. These agreements rarely get into Court for the reason that a lawyer will invariably discourage a suit unless there is a chance of working in a consideration edgewise. Now whenever such a state of affairs exists it is quite evident that the promisor has some sort of motive for entering into the promise; and he naturally feels that

if he promises at all he wants that promise to have legal force. He wishes to incur a legal obligation. By the common law, of course, no legal effect is given to such a promise unless it is supported by some consideration either given by the promisee or received by the promisor; or the agreement is under seal. The most worthy motive imaginable can not render a gratuitous promise binding in our law.¹

The question then, is, should the law permit a legal liability to attach to such a gratuitous promise, or should it require that something of value be given or done for the promise before granting it recognition; and the answer is that the law should permit whatever universal custom demands, provided that it is warranted by long centuries of legal experience.

To illustrate the transaction referred to: A is indebted to X for \$1,000 but is compelled, we will say, to leave town for parts unknown. B however, who is a friend of A's and desirous of helping him in every way possible, wishes to become responsible to X for A's debt; and this for the reason that he does not care to have it appear that A is unscrupulous and has departed secretly for the purpose of avoiding payment; and for the further reason that he would like to see X get what is justly due to him. Such are his motives; and accordingly he goes to X, states the case, and ends by giving him a written promise to pay \$1,000. This is done in the best of faith; and yet it is very doubtful whether both parties intend or believe that promise to have legal force.

This kind of transaction is usually accomplished through the medium of a promissory note, though sometimes by a written agreement starting off with the stock phrase: "In consideration of one dollar to me in hand paid, etc."—no dollar in fact having been paid, neither of which have any legal efficacy whatever, although it is invariably the opinion that a promise to pay in the form of a note is good notwithstanding no consideration is given therefor; and when they are held bad both parties to the transaction receive a shock. The law, however, is clear. If the promisee

¹ Bearing in mind that this argument is concerned with such cases only as are mentioned above, and where no other legal consideration exists; and that as to such cases the requirement that some consideration be actually given for the promise, is not simply a technical and useless formality but is the kind of evidence the law will insist upon before it will enforce an otherwise voluntary promise.

had given something of value, however slight, for the promise, say a dollar, the promise would have been legally enforceable, because even a small consideration presently received will support a promise to pay an unlimited amount in the future. Of course, if in the case assumed, the parties had been aware of this fact they might gladly have exchanged the dollar, but they did not know of this legal sophistry, and so go without a remedy. And the question that naturally arises is: what vital force is there in this doctrine of consideration that imparts such life and character to an otherwise unenforceable promise, and gives it some standing in Court. Is it possessed of any inherent merit, or is it simply the devise of lawyers concocted to thwart the intentions of the unwary.

At common law, agreements under seal were of course binding without any consideration. The affixing of the seal was a formality that shewed an intention to become bound, and dispensed with the necessity of consideration; or as it was sometimes said, consideration was conclusively presumed. The obligor was legally bound because the formality of sealing the instrument was conclusive evidence of his intentions in the matter. The fact of importance is the formality of execution. This formality, however, has long since degenerated into a fizzle, until it has come about that to-day, the seal is in fact little more than a legal curiosity. In New York, seals have been effectually done away with by section 840 of the Code of Civil Procedure which provides that: "A seal upon an executory instrument, hereafter executed, is only presumptive evidence of a sufficient consideration, which may be rebutted, as if the instrument was not sealed." This provision gives such instruments the same status as that of negotiable paper: consideration is presumed but must be proved.

The common law theory of sealed instruments was good. Liability attached when the prescribed legal form was used. The formality indicated the intention to become bound, and the intention sufficed. This in fact is all that reason demands: first, the intention, then the evidence thereof. If the formality of a seal had remained a formality in fact there would be something to say for sealed instruments; but, as convincing evidence of intention, a seal to-day, is

utterly worthless. Some other evidence of this fact is therefore essential, and that evidence appears in the common-law doctrine of consideration.

An analysis of the case just mentioned will disclose first, that motive is of the very essence of a binding agreement; and second, that there should be present unmistakable evidence of intention to become bound. The first of these conditions is easily gathered from the surrounding circumstances, and would be evidenced in a variety of ways; but the second requires that some prescribed form be gone through by the promisor in order that the promise may be clothed with a serious aspect; and that form, it seems, should consist of more than a mere writing,—at least before the law will take cognizance of the promise.

A century and a half ago Lord Mansfield held out for the abolishment of consideration altogether. Said he: "I take it that the ancient notion about the want of consideration was for the sake of evidence only, for when it is reduced into writing as in covenants, specialties, bonds, etc., there was no objection to the want of consideration."² But it is believed that this is going too far. Is it reasonable that the evidence of intention should be gathered from a mere written promise. Reason somehow says that it is not. It is not a sufficient guaranty of intention to incur a real live obligation; it is too easily entered into to be taken seriously in a Court of justice. The teachings of experience go to shew that a mere writing is insufficient to impress the promisor with the seriousness of his undertaking. Would then the acknowledgment of a promise, say, before a notary be a sufficient indication of intention. No. It is believed that it would not, for that method too, as in the case of the seal would degenerate into a useless formality—and so it goes. In what other ways, then, may intention be manifested.

The "stipulation" of the civil law is of interest in this connection. By it a promise may become binding without consideration if the required form of question and answer be followed. "All that is essential is that the obligatory consensus shall be expressed in due legal form by a question on the part of the creditor and a corresponding answer on

²*Pillans v. Van Mierop*, 3 Burrow, 1063.

the part of the debtor. Given these conditions the contract is valid and actionable on the ground of the form in which the words are put, and it is immaterial whether the debtor received any consideration for his promise or not. All that the creditor need prove is that, as a matter of fact the stipulatio was concluded. The debtor's obligation rests on the verba and on them alone."³

It cannot be said, however, that the question and answer form is any more conclusive on the fact of intention than a written promissory note. And even if the catechising process were extended somewhat it is believed that this too would degenerate, and would in the course of time come to consist of a formal printed blank with both questions and answers printed thereon; binding when signed by the obligor, but most unsatisfactory as proof of intention. This question of intention is in fact everything. Intent itself, is an ever living force, and evidence of that intent must be of a like nature. Just so soon as this evidence assumes the stereotyped form its usefulness is at an end.

When a Court compels a man, in pursuance of his promise, and against his will, to pay \$1,000 or \$100,000 as the case may be, to another, for which promise he has received absolutely nothing, that Court wants to be presented with more evidence of unqualified intention than a mere paper writing which may have been given without much thought. There may have been the very best of motives, but that itself is insufficient in view of the fact that the obligor is objecting to pay. Consideration, however, very effectively supplies this need. The obligor has received something, and for this he has given his promise. That is enough; the Court is convinced, and will order accordingly. It matters not how small the consideration is, and our law to-day holds to the view that the smallest consideration (provided it be of some value in the eyes of the law) presently given, will support the largest of promises to pay in the future. The consideration, moreover, is deemed to be full compensation for the promise. The Court will not look into the motive—so it says; but as a matter of fact it does, unconsciously. Such a rule works well enough in cases where the consideration given for the promise is large enough to be a motive in itself, but in cases where the consideration is merely nom-

³ Sohm's Institutes of Roman Law (Ledlie), Page 401.

inal, and given for the purpose of evidencing intention, the Court must of necessity look into the motive.*

In the early days of assumpsit the consideration was required to be a substantial equivalent for the promise, but as time went on more liberal notions came to be entertained by the Courts, until it has come about that to-day if anything of value be given or done in exchange for the promise, it is sufficient to render it enforceable. Consideration and motive, it is said, having nothing in common. If a consideration (no matter how small) has been given the Court will enforce the promise to pay the largest amount in the future, without looking into the motive. Langdell expresses it thus: "So a promise may be made for a nominal consideration, i.e., the consideration may be given and received for the mere purpose of making the promise binding; and in all such cases there must of course be some motive for the promise besides the consideration. It must not be supposed, however, that motive as distinguished from consideration, can constitute any element of a contract, or that it is a thing of which the law can strictly take any notice. On the contrary as every consideration is in theory equal to the promise in value, so it is in theory the promisor's sole inducement to make the promise. As the law cannot see any inequality in value between the consideration and the promise, so it cannot see any motive for the promise except the consideration."⁵

It is submitted, however, that while the law may look at it in this way the Court does not. When the consideration is in itself a substantial equivalent for the promise a sufficient motive appears from the consideration alone; but when the consideration is nominal merely, the Court while

*The principle of the civil law is summed up in the case of *Mouton v. Noble*, 1 La. Ann. 192, thus "Requiring a small pecuniary consideration to support an agreement, is a mere fiction which the civil law has never adopted. . . . In contracts of mutual interest, the cause of the engagement is the thing given, or done, or engaged to be given or done, or the risk incurred by one of the parties; and in contracts of beneficence, the liberality which one of the parties wishes to extend to the other is a sufficient consideration. But when an engagement has no cause, or consideration, or, what is the same thing, where the cause for which it is contracted is false, the engagement is null, and the contract based on it is also null and cannot be enforced by an action. . . . The civilians use the term cause in relation to obligations, in the same sense as the word consideration is used in the jurisprudence of England and the United States. It means motive, the inducement of the agreement."

⁵Summary of the law of Contracts sections 60 & 61.

saying that it disregards motive, in fact scans very closely the judicial horizon for a motive of some sort, and if this intangible quality is present it enforces the contract. But if, on the other hand there appears to be no motive whatever for the promise, fraud inevitably looms up and the contract is declared void. In reality, however, it may be that actual fraud is entirely wanting, but no Court would compel a man to pay (say) \$100,000 where he had received but \$1 for the promise, if no motive existed for such a promise, motive being always regarded as a variable quantity, and depending on the particular case. It may consist of an infinite variety of reasons, such for example as friendship, past favours, intent to please and so on. But probably no one would make a promise so disproportionate in amount to his worst enemy. An entire lack of motive of necessity savours of fraud or duress; and it is in fact immaterial whether or not it is called fraud, duress or lack of motive; the contract is void.

Again, would \$10 be a sufficient consideration for such a promise where there is an entire lack of motive? Probably not—again bearing in mind that cases where there is an entire absence of motive are rare. On the other hand \$100 probably would. The Court must simply view the legal consideration in connection with motive, and if the motive is there the smallest consideration is evidence of intention to act on the motive.

Assuming then a motive to exist what is the most satisfactory evidence of intention to enter into a binding agreement. The formal question and answer of the Roman law is good but the convincing evidence of intention is apt to wear away as time goes on into an empty formality, as has the seal at common law. The doctrine of consideration on the other hand, would appear to be the most satisfactory and convincing evidence of intention that legal experience has produced. And this for no other reason that when a man deliberately sits down and writes out a promise to pay a sum of money to another, and is then given something of value by the obligee for this promise, that formality of give and take indicates better than any other conceivable process an intention to become legally obligated. The obligor has received something of value from the other, something to which he had no right. In accepting it he must have in-

tended something in return. He meant to incur a legal obligation. Intention is evident.

Now since it is the receipt by the obligor of something of value that convinces the Court (or any one else) of his unqualified intention to become bound to pay the larger amount; and since it is the tendency of the law to permit this consideration to waste away, might it not be advisable to have recourse to legislation for the purpose of checking this tendency, and of preserving intact the doctrine of consideration?

Somehow or other it is hard to get away from the reasoning that if a person undertakes to enter into a legal obligation he ought to receive something for his promise, even though he may not, at the time want anything. What he doesn't want then, any more than what he wants when sued on his promise, should not affect the case. Accordingly if B in the first illustration promises to pay X the thousand dollars due from A, that promise is not enforceable unless X gives some consideration for it. A most substantial and worthy motive exists, but the promise will not be recognized in a Court of law for the reason that it is not clothed with a sufficiently serious aspect. The law says to the promisor: "You probably did not mean what you said or did not comprehend what you were doing." If X on the other hand had given B \$1 that would have been sufficient. If he had given fifty cents that would have been sufficient too; and twenty-five cents; and perhaps ten cents; one cent, or even a brass check. But in each of these cases the evidence of intention is becoming less and less until it finally disappears in the brass check. It is still a legal consideration, but it is most unsatisfactory.

Now as the long history of Roman and English law has shewn that it is the convincing evidence of intention to be bound that is at the foot of the law of contracts; and as our common law doctrine of consideration has manifestly proved itself to be the most trustworthy evidence of intention would it not be proper for a very short statute to be enacted specifying the minimum amount that must be given at the time for a promise to pay a larger sum in the future? This would be placing a minimum on the doctrine of consideration, and the small sum received by the obligor would give his agreement legal force; and in the future transac-

tions like that of A, B and X supra would be on a substantial basis.

To summarize: Intent to incur an obligation, taken in connection with motive constitutes the mainspring of a contract. All else is subordinate to this, and dependent upon it. The doctrine of consideration, properly considered, is simply a form of manifesting the intent. It is properly allied to motive, for without the presence of any motive, a promise to pay a very large sum in consideration of a trivial sum would savour of fraud. Therefore in practice, such a form of entering into a binding promise is a salutary one; but if in such a case there should be an entire absence of motive, it is obvious that the agreement savours of fraud, and the transactions should be attacked on this ground, and not for the mere inadequacy of the consideration. The consideration, no matter how small, is a mere token evidencing intention to become bound.

R. H. GWYNNE.

New York City.

STONORE SAID.

What he said was spoken in the year nineteen of the third Edward. England was still feudal England; the language of the land was still French; it was taught in her schools and spoken in her courts, where it was to persist as a living language for a long time to come, and to fix itself indelibly into the structure of the legal language of England. So in that year and among that group of lawyers and justices sitting in Hillary Term to decide a somewhat troublesome point, there was no question as to the use of any other tongue. Had they been asked to plead in any other language they would doubtless have been sorely tried. All their words of art were in that tongue, and they would have inevitably fallen back upon their well-known phrases had they tried to speak in any other. In that year of 1345, when they were tirelessly trying to unravel the tangled threads of interwoven rights, they would have shrunk from pleading in English much as the opera star of to-day shudders away from the suggestion of singing in such an inartistic medium.

Before Stonore can be brought forward we must introduce Hillary, who was sitting on the bench with Sharsbull, and with Stonore as Chief Justice. Hillary, justice, says to Birtone, who is of counsel: "You say what is true; and therefore demandant, will you say anything else to oust him from being admitted?" R. Thorpe: "If it so seems to you, we are ready to say what is sufficient; and I think you will do as others have done in the same case, or else we do not know what the law is." Hillary: "It is the will of the justices." Stonore: "No, law is that which is right."

"Now, that is the translation of the case given in the Rolls Series of the Year Books.¹ The words actually used by Stonore were: "*Nanyl, ley est resoun*," and while Mr. Pike, the learned editor and translator of that volume of the Year Books, has a perfect right to translate "*resoun*" as "right," and will be upheld by the dictionaries in doing so; yet, if it is contended that Stonore did not mean to say that law is "right," but that he meant to say that "law is reason," there can be little dispute but that one is equally right, and the dictionaries will be quite as accommodating. Let us

¹ Y. B. Rolls Series, 18 and 19 Ed. 111, pp. 378-379.

look at this question a moment. Thorpe is arguing in the manner of the blustering pettifogger, the conservator of things as they are, that his opponent will "do as others have done in the same case." Hillary, justice, seems to see in this remark of Thorpe's a slur of some sort and instantly counters with the plain remark that "it is the will of the justices," apparently meaning that when we do know what the law is, we know that it is their will. That has an extremely modern appearance; it looks as if there were people even then who calmly assumed that the common law was without any thing to guide it but the will of those upon the Bench—judge-made law with a vengeance!

But in Stonore we meet with material of a different type. He does not leave a moment for the theory of his companion to sink into the minds of counsel or spectator; he speaks immediately and with a certain tone of assured authority: "*Nanly, ley est resoun.*"

Now what did Stonore really mean when he said "*Ley est resoun?*" It is of interest for us to know, for if we are to know what the common law really is, we must go back and find out what those who had its making in their hands thought of it, and how it worked out through all those early centuries of its growth into what we find it to be now. Had Stonore alone simply uttered his "*Nanly, ley est resoun,*" it would probably have occurred to no one to doubt the accuracy of the translation of the phrase into "law is right," and it would have been of little value to any discussion as to what our law is. But this matter comes up again and again in the Year Books, and the phrase that Stonore used here seems to have been that well-known maxim of the law, afterward paraphrased and used by Coke. In the course of time, we find Wampage using it in a case in the fourteenth year of Henry Sixth.² The case that is being argued has been a difficult one, and it has been argued and adjourned, and re-argued until it seemed that there was but little hope of getting out of the petty tangles of involved precedent unless something higher and more authoritative was mooted; and this something that Hillary seized on was that old maxim which Stonore had used in 19 Ed. 111. "*Et Sir, le ley est fond de reson, et ceo que resoun est ley.*" Now, surely Wampage meant to say, "Sir, the law is founded upon reason, and

² Y. B. 14 Hen. IV, p. 19, pl. 60, see page 21. for the remark of Wampage.

that which is reason is law." It is the very phrase that Coke used when he said:

"Reason is the life of the law, nay the common law itself is nothing else but reason; which is to be understood of an artificall perfection of reason, gotten by long study, observation, and experience, and not of every man's natural reason; for, *Nemo nascitur artifex*. This legall reason is *summa ratio*. And therefore if all the reason that is dispersed into so many severall heads, were united into one, yet could he not make such a law as the law of England is."

They are all using the same word, and so were many other of the old lawyers, to denote what? Pure justice, or what we call "right," or that "reason" which Coke called the life of the law? It seems the latter, for the judges, while earnestly seeking that right should be done, did not mean that justice which might well be called the will of the justices, and which might be meted out by a benevolent judge, doing what he believed to be right, but that higher and finer right which is founded upon the reason of the law.

Well, and what then? Is it of any great importance to us what Stonore said, and Wampage thought; and do we not all know the ancient maxims of the worthy but archaic Coke? Was Coke not crabbed as well as worthy, and did not Wampage have precedent against him when he retired upon his general maxim; and Stonore, well, who was Stonore that we should stop in these busy days and hear what he had to say? What does it matter to us? Thus much it matters. If Stonore had not been able to say it, and without effective contradiction; if it had not been a recognized and fundamental maxim of our law through all those dark, or dim, or palely lighted centuries, when the common law was shaping the life of England and being shaped by it, we should have to follow the current course of criticism of the common law; we should have to grant that the common law of to-day is defective because of uncertainty; that it is a chaos to which our legal scholars have no clue; that those great foreign states which have worked out consistent codes have a scientific body of law for which we have no parallel. The Thorpes of to-day are legion; they do not know what the law is unless it is to do as others have done in the same case. The decided case decides all; we depend not on justice or reason, and as the years go on *Similievitch v. Almansour*, 1179 Pa., and *The United States v. The Flying Iclander*, 979 U. S., will be de-

cided according to the will of the Justices, for the precedents will be too many to examine and there is nothing else. If it be true that the decided case is all that we have to assist us, that it must be followed in all instances, whether or not it be based on false reasoning or on fallacious principles; if it diverges diametrically from all former cases that have been decided upon well-based reasons and the long continued and well thought out course of the law in such cases; then we should indeed have cause to wonder that the common law ever got past its first century, and became a system of law for all English-speaking people.

But we have not answered the question as to Stonore. Let us look at his record for a moment in passing, because we may as well know what sort of a man he was, and if he were likely to adopt a foolish theory to bolster up a weak bench. He was not a man whose fame has come down to us through the centuries; the reputations of those worthies of the Year Books have grown dim in these last years, while the Year Books themselves have sat dumbly on the shelves and seen men go seeking all about them for the wisdom they could have imparted had they had the power to reach out and claim the attention they deserved. Stonore was not among the great ones, and he is not here cited for his great authority, but yet he is one whose name occurs very frequently, and who helped to shape the law of his day. He was named John, a good old common name (to be sure it was "de" Stonore, which lifts him from the common mass again), in the County of Kent, or may be in Oxfordshire—the authorities are in doubt. The important fact remains that he was born in time to figure extensively as an advocate in the time of Edward the Second, and had become so important in the year six of that king as to be summoned to assist at the Parliament for that year. He prosecuted and defended suits for the king, and so we find him a Parliament man and a king's man as well; not too much of a commoner after all, a good royalist and busy doing the king's business. October 16, 1320, he was constituted a Justice of the Common Pleas. The authorities differ as to his career at this point, but they seem agreed that he continued as Justice of the Common Pleas until the end of that reign and was re-commissioned by Edward III. shortly after he came to the throne. Later he became Chief Baron of the Exchequer (in 1329) and Chief Justice of the Common Pleas later in the year. With the exception of one

or two years, he retained that honour, and died Chief Justice of the Common Pleas, in 1354, leaving, as is reported, "large possessions in nine counties." It seems, therefore, that the man was of some standing in the land and in the law; that he was no mere theorist, no dreamer of dreams, no student merely. On the whole a rather practical, hard-headed man of the world, who won honours and kept them—though the hold may have been precarious at one or two points of the game—and who died, even though he said, as Mr. Pike declares he did, "Not so, law is right," "leaving large possessions in nine counties." We have here, it would seem, a man as canny as Coke himself, yet to him "*ley est resoun*," as we would claim that it is to-day; and we would claim, as the dictionary allows us to claim, that the law is reason, and that it is right also. For, for what purpose can any system of law claim to be established? Is it not for the regulation of the relations between nations, so that justice may be done to each; and for the regulation of the relations between individuals so that justice may be secured to all? Is it not simply for that and for nothing more? And how can that object be attained more simply, more easily, and more surely, than by working out the system by which such regulation may be set to work through the acquired experience and the accumulated knowledge which is attained by the practical use of those regulations in the courts, where they are tried by every practical and theoretical test? No system of law was ever worked out in any other way; but we are told to-day that chaos comes unless we crystallize the results and form a logical scientific system, thoroughly thought out, and apply it to the common law which is the root of all systems. It seems true enough on the surface—it seems obvious; therefore it is to be distrusted, for the obvious is usually the untrue.

The critics of the present day who attack the Common Law seem to forget that it has more than one attribute; they claim that it places its whole reliance upon precedent; that it must follow all precedent slavishly—and there they leave it, with its one attribute attacked and defeated, as they most complacently imply.

It would seem that this point of view could not be seriously advanced and adhered to by thinking men, if we had not written evidence before us in a multitude of articles, monographs, papers, and after dinner speeches which have been

crystallized from their original fluid forms into solid documents. These otherwise possibly negligible declarations might not be taken seriously if it were not that they have created a sort of general feeling among those who have not given the subject enough thought to enable them to feel the fallacies of the argument, that it is true, and that the common law is really open to all the reproaches that have been heaped upon it. They have heard so often from legal lips that it is a "Codeless myriad of precedent" that they forget that Tennyson was a poet, and not a justice of the Supreme Court of the United States, or a Lord High Chancellor of England. They believe that it is a "tangled mass of irreconcilable contrarieties," although this reproach again is made by one who is not a student of the law. They also hear—this time from a legal source—that it is "Chaos" tempered by various acknowledgedly unscientific tools. If a thing is said often enough, and loudly enough, some people will be sure to believe it; and this thing has been said long enough and loudly enough to get itself believed by many who should not depend on loud voices or much speaking for their convictions.

Doubtless, all these things must also seem true to the lawyer who has never looked upon, perhaps has never been able to look upon, the law as a whole; who has groped from precedent to precedent, and fought his cases upon precedent, and believes he has won them simply because he "had a case" in his favour. Such men there are doubtless, who do not look behind the case itself; who do not know why the case they cite decides the cause; who are bewildered sometimes when even though they have "a case," even the "latest case," they do not win; they darkly suspect the Court of conspiracy with the other side, or have an heretical suspicion that the Court may have counted wrong, and mistakenly believed there was one more case on the other side than they had on theirs! So may the man in the Culebra Cut believe that the work is without plan and means simply digging long enough and deep enough and there will be the canal some day; to him the scientific plan is an unsolved mystery, and the shovels alone practical facts. But, it will be argued, it is not the man who digs at the law without skill and without knowledge who claims that the common law is without science and without plan; it is the man who does think; the man who does desire a scientific plan, who does want the law

to be carried on in accordance with a great design and a skilled knowledge, who is making this attack and making it for the purpose of improving our law. To some extent it is so; there are many minds to whom a mathematical demonstration is the highest attainment of human mentality. They forget that whenever the human integer is a part of the calculation the mathematical demonstration inevitably fails. The mathematical argument of a sociological fact always works out to the confusion of the demonstrator and the failure of the demonstration. The scientific code can be worked out with mathematical exactness, but when it comes into contact with that humanity for which it was worked out, it is denied and put to rout by that infinitely varied mass which refuses to be reduced to either scientific formula or mathematical exactness.

But was Stonore alone when he stood there in his sturdy strength and uttered his short defiance to all who would claim that that common law of which he was a part was merely precedent, or the "will of the Justices?" Were all his kind, who from the earliest Year Book steadily supported his "*Nanyl, ley est resoun*," mistaken, and was that reason of which they prated merely abstract justice and the law of nature, which they called upon for support when precedent went against them, as a last desperate resource? *Nanyl*, and again, *nanyl*. Through all the centuries there have been men of his calibre, and through all these centuries they have stood firmly for that life of the common law which is the soul of precedent and formula.

One there was who, in the opening days of our own great commonwealth, was called upon to speak as the first law lecturer of the University of Pennsylvania. Conspicuous above his fellows in the Convention which framed the Constitution of the United States, he had been chief factor in securing its adoption by the State of Pennsylvania, and was the member of the Convention most deeply learned in the civil law; that last factor should not be forgotten. When James Wilson undertook to expound a subject he did it thoroughly. His was no superficial brilliancy of intellect, content with the obvious and the easily seen. When he would find if a thing were true, he began with the beginning of history and followed it down through the ages to the least and latest data on the subject. It was his method in all matters and he followed it in his lectures upon law. One of these lectures is—for to

say "was" relegates them to the past where they do not belong—a lecture upon the common law. Now, I do not think it can be claimed that Mr Wilson was a student of the Year Books. We may, perhaps, assume that he was not, and it would not have occurred to me to go to Mr. Wilson's lectures, in 1790, for a proof that when Stonore said "*Ley est resoun*," he did not mean "right," but did mean "reason." But Mr. Wilson had no superstitions about "bewildering precedent" or any other narrow interpretation of the common law; he brushed such things aside in the true style of Stonore. Just as he gets fairly started in his lecture, he turns aside to say that the term common law is not confined to England—it is the term for other laws also. "*Euripides*" (we have at last another poet to offset Tennyson) "mentions the common law of Greece, and Plato defines common law in this manner; that which being taken up by the common consent of a community is called law." In another place he names it the golden and sacred rule of reason which we call the common law. "This," he says "is very notable; it opens the original first beginning of the common law; it shews the antiquity of the name; it teaches common law to be nothing else but common reason—that refined reason which is generally received by the consent of all."³ Surely Stonore knew of what he spoke; here is nothing about doing as others have done.

Wilson was a civilian, a deep student of the continental and the Roman law, yet he had no thought that those systems were the only logical systems ever produced by the human mind; and further, he recognized, what the modern critics fail to notice, the great part which the common law, in its broader sense, plays in all these systems. The modern critic speaks as if codes and systems did away with the common law. "Rome retained her common law as long as she was free and powerful; no state either is or has been without a great body of the common law—that law whose authority rests upon reception, approbation, custom, long and established. The same principles which establish it, change, enlarge, improve, and repeal it."⁴

Any system which did not rest upon reason would be destined to death before it had really begun to exist. No one claims that any system ever did rest upon anything else, except those who claim that the common law is a mere

³Wilson: Works, Vol. 2, p. 4, 1st Ed., 1804.

⁴Wilson: Works, Vol. 2, p. 38, 1st Ed., 1804.

mass of undigested cases. And they would see this claim in its bald absurdity did they think for a moment of the impossibility of the thing. A system of law growing up through centuries, playing its important part through eight or more centuries in a civilization advancing steadily in everything that goes to make for the healthful growth of mankind; art, letters, morality, wealth, and the social condition of the people. That system of law of which Dr. Francis Lieber spoke in this fashion:—⁵

“A living common law is, as has been indicated, like a living common language, like a living common architecture, like a living common literature. It has the principle of its own organic vitality and of formative as well as assimilative expansion, within itself. It consists in the customs and usages of the people, the decisions which have been made accordingly in the course of administering justice itself, the principles which reason demands and practice applies to ever-varying circumstances, and the administration of justice which has developed itself gradually and steadily. It requires, therefore, self-interpretation or interpretation by the judiciary itself, the principle of the precedent and ‘practice’ acknowledged as of an authoritative character, and not merely winked at; and in general it requires the non-interference of other branches of the government or any dictating power. The Roman law itself consisted of these elements, and was developed in this manner as long as it was a living thing.

“The common law acknowledges statute or enacted law in the broadest sense, but it retains its own vitality even with reference to the *lex scripta* in this, that it decides by its own organism and upon its own principles on the interpretation of the statute when applied to concrete and complex cases. All that is pronounced in human language requires constant interpretation except mathematics.”

“So long as the Roman law was a living thing,” it remained a common law; codified it ceased to live and became, like those planets which whirl in space, perfects worlds, but cold and dead; unfitted for humanity, while the common law lives in its as yet unattained perfection, a warm and living thing, where humanity may still find shelter and put forth new and fresh life with every passing season.

⁵ Lieber: Civil Liberty and Self Government, Vol. 1, pp. 222-223.

Rome died, but left as a legacy to those peoples who should come after it a system upon which they might model their own systems of law. The continental nations have done so; they have adopted and adapted the Roman system, and it is continental law, we are told to follow because of its scientific form, its greater clearness, its sureness, its practical convenience.

Does the actual practice of the civil law, as systematized and condensed into codes shew it to be so much more simple, so much more condensed, so much more certain? To take an example from the law of Germany. It is popularly supposed that one has only to go to the *Bürgerliches Gesetzbuch* (endeared to the public mind by its diminutive, the "B. G. B.")^{*} to find all the law applicable to his case, in clear and definite language, so that nothing more has to be done; there is the law, under a scientific definition, and if it does not agree with his theory of what the law should be for his client's case, so much the worse for him. That is the law; there it is, and there is nothing more to it. Quick, simple, efficient; no looking after decided cases, no bewildering precedents; just plain, clear scientific demonstrations; every thing settled in a trice.

Take the simple matter of the working out of a contract, and a contest upon the contract; one suing because it was not carried out; the other defending because according to the code there was a carrying out so far as was possible. There is the code, that shews just what the parties can do, what they should do, what their rights are. But upon appeal to the code it is found that this is a commercial contract; the civil code does not contain the principles of the commercial code; we must turn from the B. G. B. to the H. G. B. (*Handelsgesetzbuch*) and we must construe the law we find there in accordance with the general provisions found in the B. G. B.; we must decide if the provisions of the H. G. B. are in accordance with the B. G. B. or not, before acting upon its provisions. Further, after making up one's mind on that point, one must go to the commentaries upon both

^{*}This code, by the way, has been called "a scientific body of law, a system of principles supported by a sound philosophy which has awakened the admiration of the civilized world." Introduction, p. 10, *Guide to the Law and Legal Literature of Germany*, Borchard.

the B. G. B. and H. G. B. to find what is the interpretation they have put upon these sections of the Code; these commentaries not being clear expositions of the law, fortified by references to the reported cases as deciding the matter, but rather analytical or theosophical theses upon the subject matter in general. But still they do contain references to the decided cases of the Supreme Court of Germany, and perhaps to the lower Court decisions; these reports now being contained in long sets much like our own sets of reports. But having reached this point no decision is arrived at, for while these decisions are cited, and have no influence upon the Court, they are not considered to rule the specific case; they are but matter to aid the Judges in forming their opinion as to what the law was intended to be by the framers of the Code. . . . We are, therefore, thrown back, for our reason for the law, directly upon the reasoning powers of the Judges without binding authority—that reason which, however well trained and enlightened, is but the reason of the individual—in contrast with that reason of the common law, which is that of the trained and enlightened reason, guided, sustained and directed by that reasoning of the ages of judicial decision, by which the principle to be applied to the case is found, and when found followed. The true value of the common law lies here. Other systems have crystallized their law at a certain period or certain periods; they have then depended upon the reasoning of the individual interpreters of that law, furnished with guides who do not have to be consulted, but who may be consulted if the Judge thinks necessary; with precedent at hand, but not authoritative precedent; with reason, not of the individual, but of the collective generations, at hand—if cared for, but only if cared for. The common law has garnered the reasonings of all its conscious generations, and made them authoritative. The reasonings, not the cases. No case is of any authority if it is not based upon firm and well-sustained principles. Any case based upon weak or insubstantial reasoning is liable to be overturned at any moment; it is not the case that counts, it is the reason that underlies and supports it. And when the case is so overturned men cry, "See the uncertainty of the law; one day it is this, the other that; give us Codes so that we may know what the law is." They do not see or do not understand that it is because the law is based upon principle and upon reason that

the mere mistaken dicta of a careless or unintelligent Courts cannot stand when once the error is observed.

The codes, again, are defective because of their very virtues. They are the product of the trained minds of earnest thinkers, devoted to the law and to the working out of a perfectly coherent, well-balanced theory of that law. They are, or they are intended to be, creations without flaw; worlds without tempests, without earthquakes or floods; all is still and serene; no imperfect buds appear on the parent stem, leading to no fruit. No meandering streams lose themselves in marshy meadows; all turn the mill-wheels which produce the perfect product. And this perfect product is to be used by imperfect man, with all his defects, and made the rule of all his actions. A splendid mechanical system admirably adapted to a mechanical man. A Cinderella's slipper forcibly fitted to the awkward feet of the generations who climb slowly along the steep pathways of life; feet that must try to wear them, though they cause many a stumble. We have come to believe in these latter days—although there are still many heretics—in the possibility of self-governing peoples. We have even come to the belief that with all their faults, such self-governing peoples represent the highest type of humanity as yet evolved. We think we see infinite possibilities of further development through the further growth of the power to govern itself which humanity is constantly shewing. This being granted—and we in turn concede that all will not grant it—we must look for our ideal law in that which is the best adapted for growth and expansion; for the keeping pace with the footsteps, fast or slow, of the marching masses of men, who must live in accordance with its rules. And as that progress cannot be by force of initiative from the more enlightened minds, by means of being forcibly drawn forward by those in advance, but can only be worked out as an individual development, by the slow and stumbling progress of humanity itself; so that law which will be the best adapted to such a progressive humanity must be a law which has likewise been worked out slowly, roughly, circuitously, by the same slow and rude methods. Such a system of law has been growing up through all the centuries since the first Angles and Britons, Saxons, Danes, Normans, and Celts, began to lay down rules for their own government. It has never ceased to grow with the growth of the

civilization of which it has been a part, in which it has been as Lieber again says:—

“One of the mainstays of civil liberty; and quite as important as the representative principle. . . A great element of civil liberty, and part of a real government of law, *which in its totality has been developed by the Anglican tribe alone*. It is this portion of freemen only on the face of the earth which enjoys it in its entirety. . . . The independence of the law, or the freedom of the *jus* in the fullest and widest sense, requires a living common law, a clear division of the judiciary from the other powers, the public accusatorial process, the independence of the Judges, the trial by jury, and an independent position of the advocate.”

A “living common law” is the well spring and source of a living commonwealth. We can and do crystallize our fundamental law into constitutions, but we have each year, or at least every second year, a living mass of legislation which frames the more ephemeral rules under which we live and by which our conduct is regulated. If we compare a constitution to a Code, we make a mistake, since we only place within our constitutions such fundamental principles as we believe need no changing for, it may be, generations. In our Codes we place the whole field of the law. We may place in the constitutions the crystallized product of our experiment in government, for government is a stable thing, not to be lightly changed, but the law by which the peoples live is as fluctuating by its very nature as that life that is regulated by it. Those philosophic systems which have been produced with great care and moulded into Codes are magnificent specimens of that which the trained intellect can produce—the best of them are splendid examples of technique. But the attempt to make the tumultuous, surging life of humanity flow according to such systems is to reduce to the canal-like docility of the English streams, the Mississippi in the spring floods. To make a net work of placid canals of this mighty river of the common law, so that any man, however unskilled, might take his little row boat and row placidly about on it, would doubtless be very pleasant for the little man; but the life of humanity and the life of that law by which it lives are one, or else humanity is “cabined, cribbed, confined,” and ceases to grow, or grows distortedly.

¹ The italics are mine.

The people who are cramped on their spiritual side, or their physical side, or on their legal side, suffer, and, growing old, decay and die. The people who keep themselves uncramped, spiritually, physically, legally, live on, constantly growing up toward a fuller and a fuller life.

Yet we do not want to carry the argument too far; it is but in revolt against the extravagant mis-statements of those who have failed to see the reason of the common law; who have denied to it coherency and clearness, that these arguments are used. It is not contended that there should be no analysis; no synthesis, no grouping of the principles of the common law. There should be all these, and first of all, there should be that developing of the principles; that logical outlining of the theories; that clear statement of the growth and conclusions of the law on fundamental topics, which make up the true treatise upon the law. That is the sort of treatise we do not have to-day. It would seem that the treatise writers are content with the ordinary title of "text book" writers, and with the ordinary function of such writers. They seem also content with that definition of the common law against which we are contending; and rest satisfied with gathering together the greatest mass of precedents possible, threaded together with a thin stream of general remarks. They give us no reasoned theory; no scientific analysis; no skillful summing up, which shews the defects of the reasoning of the cases, or the result which should be attained. They are doubtful as to the law, because they find that decided cases differ; forgetful that it is their province to sift all this matter, and shew where the principle—the immutable principle—must rule. There are a very few exceptions, of course, but the need of the common law of to-day is the learned, the philosophic, the reasoned treatise. Not the long drawn-out, minutely tedious, over-detailed production of the German press, with its awkward phraseology, or the rather too swift and easy French adaptation of the same thing; but the production of the true scholar, who does not give you a reproduction of every mental twist and turn he took in evolving his production, but does give you the clear product of all these twists and turns, and gives it to you in a simple and effective language, like, if heaven has so gifted any one now living, the language Maitland gave us in his later years.

Neither is there any reason against simplifying the legislation of years and bringing it all into a simple and practical shape; there seems to be no reason why that should not be done regularly and, as a matter of course, at stated times every few years; that is not codifying the common law; that is simply untying legislative knots made by the unskilled fingers of the legislature, whose constituents think "there should be a law" on every subject under the sun. To do this is generally to go back to the common law and out of the reasoned mass of precedent, select that which has been found most reasonable; that is most adapted to the life of the people. It should be a mere matter of simplification, and if it is to be useful should, as has been said, be done as a matter of course every few years. There is nothing inimical to the common law in any of these things, but neither are any of these things anything more than mere mechanical aids to the administration and execution of the great system of the common law; that law which, teaching the people and being taught by it, modulating it and being modulated by it, is unvarying in its underlying principles, and ever changing in its superficial manifestations. The objection to the Code system seems to be that it endeavours to crystallize the superficial manifestations, as well as the underlying principles, and it necessarily fails; in a few years the manifestations have changed and the Code has become a nuisance; it no longer represents any phase of the life of the people and is simply in the way.

Let us again appeal to Mr. Wilson to state in his dignified and measured phrases the true theory of the common law:

"In all sciences, says Lord Bacon, they are the soundest that keep close to particulars. Indeed, a science appears to be best formed into a system by a number of instances drawn from observation and experience, and reduced gradually into general rules; still subject, however, to the successive improvements, which future observation or experience may suggest to be proper. The natural progress of the human mind, in the acquisition of knowledge, is from particular facts to general principles. This progress is familiar to all in the business of life; it is the only one, by which real discoveries have been made in philosophy; and it is the one, which has directed and superintended the instauration of the common law. In this view, common law, like natural philosophy,

when properly studied, is a science founded on experiment. The latter is improved and established by carefully and wisely attending to the phenomena of the material world; the former by attending, in the same manner, to those of man and society. Hence, in both, the most regular and undeviating principles will be found, on accurate investigation, to guide and control the more diversified and disjointed appearances."

MARGARET CENTER KLINGELSMITH.

Biddle Law Library,
University of Pennsylvania.

Wilson: *Works*, Vol. 2, pp. 43-44. First edition, 1804.

EDITORIAL.

In London recently a number of women were sentenced by Mr. Justice Phillimore, after having been found guilty by the jury of conspiring together with other persons to inflict damage to property and to incite others to do likewise. The learned Justice in summing up, said that this was one of the saddest trials of which he had ever had experience during his period of nearly 16 years on the Bench. A number of women and some men—of whom some were before the jury—people of education and refinement, in the enjoyment of all the advantages of civilization, were accused of committing and of inciting other women to commit crime against property—against property it was true, but against property in cases where great misery might be brought on the victims, and where the result might be to cause physical injury.

A few days previously, another woman was injured and later died as a result of an attempt to interfere with the Derby, and the papers daily contain paragraphs of arrests, imprisonments, hunger fights, and forcible feeding, also serious illnesses of women resulting from treatment they have received on account of what they believe is a fight for justice.

Whatever one's opinion may be in this 20th century, it appears strange that the franchise which is given to anything called a man should be denied "to women," as the learned Judge states, "of education and refinement." Naturally most men are prejudiced against women taking part in politics. But the grave question is, "The opposition to women receiving the vote merely on account of the prejudice which has been for the growth of centuries, against seeing women in any position other than in their own homes, a position which is undoubtedly the highest a woman can occupy, if her home is a happy one.

It is well known that women are antagonistic to the liquor interests and if given the vote would very speedily relegate those who batten on the misery and degradation of the British people to the position they properly should occupy.

In any event it is as great a shock to one's prejudice in seeing women mishandled and treated like criminals as it would be were they to change this sphere from home to the political arena.

The question that presents itself to one's mind is, "Is it fear of giving the women the vote or the fear of what they might do should they obtain it?"

CANADA'S CREDIT ABROAD.

For several years past there has been a period of great expansion from one end of Canada to the other, and money appeared plentiful for almost any project that had the appearance of being legitimate. So easy was money to procure that in many cases *bona fide* expansion degenerated into reckless "wild-catting." Farms were sub-divided for miles surrounding growing towns and cities, the sub-divisions being sold as town lots, although in many cases there was not the remotest possibility of the town reaching many of the sections sold, for years to come. This was bad enough when the advertising and selling was confined to Canada alone, but in the scramble to get rich, many projects were presented to the investing public in Great Britain and on the continent, in which the names of prominent Canadian financiers and a number of Government officials were connected. People in England were induced to invest in some cases, their all, only unfortunately to find out that the purchases were of as little value as the swamp land of the Southern States.

These methods of "unloading" unsavoury schemes have unfortunately become too frequent, with the result that Canada's credit has been materially damaged, and people look askance at what may be a first-class proposition.

Surely some method can be devised to protect unwary people from being taken in by the worst of promoters, land sharks.

PERSONAL.

According to the new Act passed at the last session of the Dominion Parliament, whereby County Judges must retire on reaching the age of 75 years, or may retire on completing 30 years on the Bench, Judge Morgan, Toronto's well-known Judge, will have to retire. He will receive a pension for life equivalent to his present salary, which is about \$3,000 a year.

Second year students at the Ontario Law School have established a new record that it will be difficult to equal, much less excel, for many years to come. Out of one hundred and two men entered for the second year examinations, only two were plucked, eighteen passed with honours, and seven of these won money prizes. The results were announced at Osgoode Hall recently by the secretary of the Law Society. A Toronto man, H. S. Hamilton, heads the list and wins \$100. D. W. Lang, of Haileybury, is second, and gets \$60. The next five, E. R. Thompson, E. H. Cleaver, P. W. Beatty, L. Mainlay, and I. Fineberg, secured \$40 each. The other honour men were: V. E. Gray, S. J. Birnbaum, G. D. McLean, E. Bristol, E. M. Reeve, S. G. Metcalfe, S. Rogers, A. W. Langmuir, W. P. MacKay, F. T. Hetherington, G. W. Walrond.

The others passed in the following order: V. H. Hattin, R. B. Law, W. N. Hancock, W. H. Bennett, J. F. P. Birnie, H. S. Robinson, R. M. Dick, J. S. Beatty, J. R. Rumball, A. Singer, C. H. A. Armstrong, D. G. McIntosh, C. J. F. Collier, C. G. Robertson, J. E. Anderson, E. C. Awrey, J. W. Broudy, B. F. Fisher, J. W. Gauvreau, L. C. Outerbridge, H. D. Anger, W. Lawr, W. M. Mogan, J. G. Holmes, E. P. Dowdall, R. N. McCormick, S. W. Wedd, J. A. Hope, F. Regan, J. F. Coughlin, N. M. Young, H. Morwick, G. H. Tennent, C. R. Widdifield, C. G. Mortimer, H. Obee, D. J. Coffey, C. B. Henderson, B. H. L. Symmes, W. L. L. Gordon, L. S. LeVernois, W. H. Furlong, H. A. L. Conn, J. M. Forgie, C. W. Carruthers, H. H. Donald, W. B. Henderson, Wm. McNally, E. Pepler, W. J. Grace, J. A. Donovan, J. S. Allan, N. S. Caudwell, W. T. Robb, H. A. Beckwith, H. H. Ellis, L. Dale, F. H. M. Irwin, H. J. Stuart, C. L. Carrick, G. W. Morley, L. W. Goetz, E. F. McDonald, R. B. Williams, J. M. Baird, T. M. Mulligan, W. W. Evans, O. Sauve, L. W. Wood, J. A. Devaney, B. P. Fitzpatrick, W. H. Male, C. B. Coyne,

S. C. S. Kerr, J. S. Bell, G. G. Beckett, T. W. E. Allen, W. H. Latimer, C. H. McKimm, S. W. Graham, W. A. Oldsted, R. P. Locke.

The firm of Macintosh and Gilchrist, barristers, has been dissolved by the retirement therefrom of Mr. Gilchrist. Mr. Macintosh, the remaining partner, has assumed as a partner, Alexander Simpson, late of Edinburgh, Scotland. Mr. Simpson is a graduate of Edinburgh University, and prior to coming to Canada, was for nine years in practice as a solicitor in Edinburgh, during which time he was a partner in the firm of Lawson and Simpson. The firm of Macintosh and Simpson will carry on business at 105-106 Cahill Block, Avenue A., Saskatoon.

The benchers of the Law Society of Manitoba met to consider the report made by the examiners on the recent law examinations. The results are as follows:—

Call—Atkinson, R. E.; Elliott, A. B.; Gyles, H.; Lindsay, G. C.; Gerrand, E. W.; Cole, R.; Warner, A. H.; Wallar, J. F., and O'Grady, G. F., all with honours; Hawley, A. T.; Andrews, A. H. J.; O'Grady, J. M.; Hoskins, R.; Bell, A. B.; McKenna, D.; Major, W. J.; Morrison, H. C.; Morton, J. K.; Dixon, C. H.; Jackson, C. W.; Scott, C. S.; Radford, J. H.; Graham, G. M.; Winkler, G. E.; Culver, G. W.; Brayfield, H. C. H.; Beaubien, J. T.; Fenwick, F. H.; Dalglish, C. N., and LeBel, A. U.

Attorney:—Lindsay, G. C.; Cole, R.; Major, W. J.; Hawley, A. T.; Elliott, A. B.; Gerrand, E. W.; Gyles, H.; Warner, A. H., and Hoskins, R., all with honours. Mitchell, J. W.; O'Grady, G. F.; McKenna, D.; Scott, C. S.; Atkinson, R. E.; Culver, G. W.; Andrews, A. J. H.; Bell, A. B.; Brayfield, H. C. H.; Morton, J. K.; O'Grady, J. M.; Morrison, H. C.; Graham, G. M.; Jackson, C. W.; Winkler, G. E.; Radford, J. H.; Boothe, G. C. M.; Beaubien, J. T.; Reynolds, J. E.; Fenwick, F. H.; Hamilton, F. A. E.; Wallar, J. F. and Dixon, C. H. Special, Fulton, J., and Harrison, R.

Attorney, Part I.:—Lunney, J. W.; Sheringham, C. J.; Finkelstein, C. E., and McVicar, J. A., all with honours; Yule, G. H.; Shearer, J. A.; White, L. A.; Webb, A. J.; Chappell, C. W.; Morkin, J. I.; Richardson, R. H.; Thomson, W. B.; Mills, E. R. R.; McCormick, D. A.; Bingham, E. J.; Hastings, V. J.; Rutherford, H. S., and Hetherington, F. M.

First Intermediate:—Napier, L. P.; McKinnon, M. E., and Brown, J. W., all with honours; Wilson, E. V.; Norton, G.; Love, J.; McGirr, E. N.; Jones, T. H.; Finkbeiner, A. G.; Owens, D. O.; D'Arcy, N. J.; Paulson, G. A.; Myers, F. P.; Wilton, W. M.; Leech, H.; Duncombe, G. M.; Richardson, C. L.; Pratt, J. W.; Scott, E. L.; Betournay, E. L.; Bell, W. L.; Johnston, H. E.; Borthwick, D. S., and Crepeau, J. B.

Second Intermediate:—Lamont, J. S., and Evans, A. E. A., with honours; Rutherford, G. S.; Hawkins, F. E.; Morosnick, L.; Bowler, J. R.; Dixon, P. J.; Crawford, H. C.; McBride, A.; Watson, F. A.; Hughson, F. G.; Doidge, W. A.; Matheson, E. H.; Campbell, J. F.; McManus, J. L.; Campbell, A. C.; McDonald, G. C.; Pratt, A. M.; Porter, E. G.; Axford, G. A.; Roy, L. P.; Scott, A. P.; Christopherson, J.; Philip, D. C.; Jamisson, C. N.; Smith, R. C.; Thomson, J. G.; North, R. H. B.; Munson, N., and Bryan, O. A.

It cost the Justice Department \$200,000 this year to employ outside counsel in special cases and references before the Courts. It is now intended to appoint two new legal officers in the Department at a salary of \$5,000 each to assist the Deputy Minister in Supreme Court and Exchequer Court arguments. Last year, however, was an exceptional one, owing to the Marriage Law and Companies' case references. No appointment has yet been decided on.

It is understood that at a meeting of the Cabinet, Moses McFadden, K.C., of Sault Ste. Marie, was appointed to the Junior Judgeship of West Algoma, with headquarters at Sault Ste. Marie, and J. E. Drumgold, K.C., of Windsor, was appointed to the Judgeship of the County of Essex.

The only lady law student in this district, Miss Mary McNulty, who was articled to Messrs. Code and Burritt only two months ago, presented her first case in the Division Court before Judge Gunn. Miss McNulty's task was but a small one. She had merely to appear and ask the Judge for an adjournment of a case that was heard in Chambers. There was no argument, and the Judge granted the adjournment.

Regina, Sask.:—Following were successful in passing the first and second year law examinations for the province:—

First Year:—P. M. Anderson, W. R. Mott, H. A. Rutherford, W. B. O'Regan, W. S. Walton, G. E. Kinsman, F. C. Little, W. B. Caswell, J. W. Montgomery, J. R. B. Graham, W. G. Ross, and A. F. MacDonald.

Second Year:—John Macklem, H. C. M. Brown, W. P. Cumming, R. H. Scott, J. P. Peiffer, A. S. Sibbald, F. V. Reilly, J. E. MacDemid, H. E. Hartney, A. E. Cairns, G. A. Fergusson, D. C. Kyle, F. C. Kent, W. A. Benyon, E. M. Thomson, S. J. A. Branier, S. W. Criddle, and R. J. Reid.

In addition to the above, the following barristers from beyond the province qualified for admittance to the Saskatchewan bar: J. L. Nichol, J. S. McKessock, W. A. Gaetz, G. A. Ferguson, G. W. Forbes, J. W. McFadden, G. E. Stockan, A. M. Stewart, Thomas Patterson, Alexander Simpson, Ernest Gardner, W. R. Crystal, A. M. Mathieson, W. A. Batchen.

The Appellate Division of the Supreme Court decided that an English solicitor is not entitled to practice law in New York under the rule that admits to the bar without examination any person who has practiced for five years in another country where jurisdiction is based on the principles of English common law. A member of the British bar to be entitled to admission under this rule, the Court held, must be a barrister entitled to practice in the highest Court.

Heart failure caused the sudden death of William Robinson of Chatham, for years prominent in local bar circles, and for three years cashier of the Reliance Savings & Loan Company. Educated in Chatham schools, Mr. Robinson later entered the law offices of Scane and Houston, and when admitted to the bar opened an office in Thamesville. He was well and favourably known in local musical circles, being at different times organist in St. Joseph's and the First and St. Andrew's Presbyterian Churches.

A decision that women are barred by statute from being admitted to the legal profession, and that the statutory disqualification will remain until altered by Parliament, was handed down recently by the Judge who heard the suit brought by a daughter of the Rev. Llewellyn Bebb, principal of St. David's College, Lampeter, to compel the Incorporated Law Society to admit her to the bar after the usual examination. Miss Bebb held that she is a "person" within the meaning of the law governing admission to the bar.

Mr. C. Hugh Semple, advocate, Montreal, will be an acting Recorder in the place of Recorder Weir, who will be absent from the city for some time. The notice of appointment is in the *Quebec Official Gazette*. Recorder Weir has been gone for some weeks, and his duties have been discharged till now by Judge Lanctot and Judge Leet. The new acting Recorder may become a permanent Recorder, owing to the increase in Court business, and the need for an extra Recorder on the Bench.

Mr. Semple graduated from McGill University in 1901, and has practised law ever since. He obtained his preliminary studies at St. Mary's College. He has been engaged in legal reporting and as correspondent for law journals in Canada and the United States. He is a charter member of the Parnell Branch of the United Irish League, and a member of the Council of the St. Patrick's National Society. He was elected secretary to the Bar Council four years ago. His father was the late Hugh Semple, who served on the Roman Catholic School Board for a number of years.

Claude Frederick Gifford, formerly of the Supreme Court of Judicature in Dublin, Ireland, to which he was admitted in the year 1895, was formally called to the bar of Saskatchewan by the Hon. Mr. Justice Simmons, upon the introduction of A. H. Clarke, K.C. His credentials were signed by the Right Hon. Mr. Justice Ross, Privy Councillor, and the Right Hon. the Recorder of Dublin, Privy Councillor. Mr. Gifford is at present with Messrs. Lougheed, Bennett, McLaws and Company, Calgary.

Mr. W. C. Chisholm, K.C., formerly city solicitor, and until recently a member of the late firm of Watson, Smoke, Chisholm & Smith, is retiring from practice here to join the legal department of the Grand Trunk Railway at Montreal as general solicitor of that railway. Mr. W. H. Biggar, K.C., general counsel of the railway, is head of the department.

Mr. J. E. Martin, K.C., was unanimously elected Battonier-General of the Bar of the Province of Quebec. Mr. Martin was last May elected to the position of Battonier for the Montreal Bar. He is a member of the well-known firm of Foster, Martin, Mann, Mackintosh & Hackett.

The law firm formerly known as Macdonell, McMaster and Geary will cease to exist. The first to leave was Corporation Counsel Geary, who, shortly after his appointment to that position, severed his connection with the firm in January. Since then the firm has been known as Macdonell, McMaster and Company, and now it is dissolved, each of the partners connecting himself with prominent legal firms.

Mr. A. McLean Macdonell will join the firm of Bicknell, Bain and Strathy, Lumsden Building, Yonge and Adelaide streets, which will take the new name of Bicknell, Bain, Macdonell and Strathy. Mr. A. C. McMaster will join the firm of Montgomery, Fleury and Company, which is to take the new name of McMaster, Montgomery, Fleury and Company, with offices in the Canada Life Building.

TRIBUTE TO THE MEMORY OF THE LATE SAMUEL C. SMOKE, K.C.

At the funeral service on Tuesday, 2nd June, 1913, the Reverend Robert J. Hucheson, the Pastor of the Unitarian Church, Jarvis Street, made the following address:—

Dear friends,—The thought that I want to suggest to you as we pay our last respects to our so suddenly deceased friend, Mr. Smoke, is the one dealt with by Seneca in one of the selections which I have just read. He says: "The comfort of having a friend may be taken away, but not that of having had one." And again: "He that has lost a friend has more cause of joy that he once had him, than of grief that he is taken away." In the spirit of Seneca I want to dwell not on what we have lost but on the worth of what we have had. Our late friend would have been the last man to want a flattering eulogy pronounced over his dead body, and my own deep respect and affection for him would prevent me from saying that I did not entirely feel to be true. But it is a simple matter of fact that every one who has known Mr. Smoke for the last twenty-five years in the church to which he belonged had a respect for him of a very unusual quality, it was a blending of respect and admiration and reverence and affection. In later years his business prevented him from mingling much with us in a social way, but those who have

known him all through the time of his connection with us have recognized in him a combination of intellectual, moral and spiritual qualities very seldom met with in our modern life. I have little opportunity of knowing how he impressed the larger world, but in my own little circle I have found a mental attitude towards him which is almost unique in my experience. We had that kind of confidence in his integrity which one has in the rising of the sun on each to-morrow; we looked up to him because of his ability and his position in his profession, but we never hesitated to approach him; he had a dignity about him which made us want to be at our best in his presence, but behind the dignity there was a remarkably simple, affectionate and kindly spirit which made us feel at home with him at once and put us in the mood of frank, straightforward real speech. His growing power in his profession never altered in the least, the simplicity of his nature or of his relations with his friends or his total feeling about the values of life.

As life goes by, each one of us, who is able to make a choice, selects from the many interests that the world offers, those that seem to him most attractive and our inmost nature is revealed in the choice we make. The simplicity and unworldliness of our late friend's inner nature were clearly revealed in the interests of his leisure time. In the first place he was a home man. His life had its roots in that love of home which in the past has been so characteristic of the Anglo-Saxon people and so great a source of their strength, but which, alas, is being dissipated and destroyed by our modern city life. He did not need the strong excitements which the crowd offers, nor the conviviality of the club, nor the glitter of great functions, but found in his home and the supervisions of his son's education and the company of a few friends the satisfactions of his social being. With means and ability to live in the glare of the world, he chose to walk in the common path of the affectionate husband, the wise and careful and interested father and the simple friend. Against the background of the complex life of our city, his love of home in all its old simplicity reminds us more of some of the calm heroes of the ancient world whose literature he loved, than of the men of his own time.

Again, his life was fed and sustained by a very real love for good literature. He could retire from the noisy busy world, in which his day was spent, into the far more quiet

world of Homer and Virgil and Milton and Hebrew Prophets and Psalmists. The training of his earlier life and the bent of his own nature led his footsteps often to those quiet haunts whither have resorted so many minds in the past for rest and refreshment and meditation. He was, as we all know, a herculean toiler in his profession, and I have no doubt that that toil was possible at all only because he could relax and refresh his mind every night by his contact with the free and inspired minds which have uttered their thought and feeling in great literature. He was one of the few men I have known who were deeply interested in literature for the sheer love of it, and who found in it not merely intellectual excitement but deep wisdom for life and rich emotional satisfaction.

Finally, he was deeply interested in his church, and in the maintenance of the spiritual life. Nor was this interest a merely inherited one, for the church in which he worshipped was not the one in which he was reared, but one which he adopted of his own free choice because it appealed to the simplicity of his nature and the demand of his mind for a rational as well as spiritual form of faith. No matter how busy his week days might be, he never failed, if well and in a mere bodily presence. He had a keen appreciation of any religious service in which thought and ethical feeling and simple spirituality were blended. He worked during the week as though life meant nothing but work, and his sudden death is a warning to many a professional toiler that nature has limits which must be respected, but we who saw him in the church on Sunday, and especially his minister, knew that his soul found escape from the ceaseless round of week day toil and communed with the unseen and eternal.

We shall miss him more than words can say from the small group with whom he chose to worship, but our sense of loss we put by for the moment to testify to our gratitude that he has been with us so long.

LEGAL DEVELOPMENT IN ENGLAND AFTER THE RESTORATION.

Some little time ago I was talking to an eminent historian who was lamenting that the English lawyers who had interested themselves in the history and development of legal ideas and legal procedure in this country had, mostly, set a limit for their investigations at about the time of the Civil War, whereas, said he, it would be most important for historians to have the process completed up to modern times. He said that no one had taken the trouble to investigate what kind of matters chiefly came before the Courts after the Restoration, how they were dealt with, or how the legal ideas governing the decisions of the Courts developed from that date. I acknowledged the justice of the criticism, and during part of the Long Vacation I amused myself by going through the reports of Sir T. Raymond and Levinz, which are the King's Bench Reports from the Restoration to the end of the reign of William and Mary, and making an analysis of the subjects with which the various decisions dealt.¹

There are about twelve hundred decisions in all, and the first thing that is noticeable about the list is the comparative dearth of actions in relation to commercial matters. It is not that such matters are ignored. On the contrary, almost every kind of commercial transaction is incidentally referred to somewhere.

¹ The following is, roughly, the result:

64 cases dealt with criminal or quasi-criminal matters; 26 with technical questions on error; 19 with *mandamus*; 45 with prohibition; 5 with *certiorari*; 1 with *habeas corpus*; 1 with *quo warranto*; 14 with *scire facias*; 4 with *qui tam*; 1 with *latitat*; 1 with *audita querela*; 6 with duty of sheriff; 12 with escape; 3 with rescue; 1 with hue and cry; 1 with sureties; 21 with bail; 4 with forcible entry; 2 with contempt of court; 5 with outlawry; 40 with questions of pleading; 16 with questions as to trial of actions; 2 with form of writs; 2 with evidence; 1 with writ of inquiry; 3 with execution and process; 1 with attachment; 6 with abatement; 3 with damages; 2 with wager of law; 5 with questions about jurors; 5 with bankruptcy; 2 with satisfaction of judgments; 2 with costs; 2 with accord and satisfaction; 2 with estoppel; 4 with release; 7 with privilege from arrest; 1 with privilege of Parliament; 4 with assize for office; 2 with Courts of Honour; 7 with customs and by-laws of towns; 2 with charitable trusts; 11 with apprenticeship; 1 with extortion by jailor; 1 with constitutional law; 1 with revenue; 2 with royal grants and charters; 1 with poor law; 6 with ecclesiastical law; 3 with husband and wife; 1 with jointure; 10 with dower; 8 with infancy; 32 with actions on awards; 95

Woodward v. Bonithan, Sir T. R. 3, is an application for a prohibition to the Court of Admiralty, to restrain them from dealing with an action upon an agreement for the hire of a ship, on the ground that the agreement was made on land.

Graves v. Sawcer, Sir T. R. 15, is an action by one part owner of a ship against another for fraudulently selling her abroad.

Eliot v. Blake, Sir T. R. 65, is an action in which a question is raised as to the exception of "perils of the sea" in a contract for the sale and delivery of goods.

Mors v. Shue, Sir T. R. 220, is an action on the case against the master of a general ship for goods stolen when on board.

Mustard v. Harnden, Sir T. R. 390, is an action for damages for negligence causing a collision in the River Thames.

Hughs v. Cornelius, Sir T. R. 473, is an action of trover for a ship condemned as a prize. Question as to whether judgment of a foreign prize Court is final.

Sands v. Ezton, Sir T. R. 488. Prohibition to the Admiralty Court in reference to the arrest of a ship sailing to the East Indies contrary to the East India Company's charter.

Sayer v. Glean, 1 Lev. 54. Action on bottomry bill.

Collins v. Sutton, 1 Lev. 149. Action on bottomry bond.

Stone v. Waddington, 1 Lev. 156. Action for goods sold and delivered.

Anon., 1 Lev. 166. *Assumpsit* for price of goods sold and delivered.

with ejectment; 29 with replevin; 2 with wrongful distress; 32 with rent; 30 with manors and copyholds; 8 with titles; 33 with trespass to land; 50 with covenants relating to land; 18 with devises of land; 4 with attornment; 20 with cases relating to estates in land; 1 with parcels; 4 with formedon; 2 with partition of lands; 2 with prescription as to lands; 3 with nuisance; 1 with ancient lights; 3 with ways; 1 with watercourses; 3 with highways; 3 with waste; 1 with common recovery; 8 with statutes of limitation; 3 with use and occupation; 62 with debt; 55 with *assumpsit* (except in cases otherwise specified); 2 with account; 4 with conditions in bond; 22 with cases connected with shipping (chatter-party, bottomry, etc.); 7 with actions on wagers; 6 with sale of goods; 5 with marriage brokerage; 2 with breach of promise of marriage; 2 with bills of exchange; 2 with *quantum meruit*; 25 with trover; 66 with slander; 1 with libel; 18 with trespass to goods; 19 with trespass to person; 41 with trespass on the case (for matters other than those specified); 2 with personal negligence; 1 with deceit; and 49 with actions by and against executors.

Hussy v. Pacy, 1 Lev. 188. Action for breach of covenant not to import certain goods.

Jurado v. Gregory, 1 Lev. 267. Prohibition to the Admiralty with reference to a contract at Malaga to load goods there.

Brown v. London, 1 Lev. 298. *Assumpsit* on the custom of merchants by drawer against acceptor of a bill of exchange.

Martin v. Delboe, 1 Lev. 298. Statutes of limitation not pleadable on accounts stated between merchants.

Watton v. Weddington, 2 Lev. 7. Action on *bouonry* bond.

Ridly v. Eggesfield, 2 Lev. 25. Case for suing in the Admiralty in respect of ship taken by pirates.

Bolton v. Lee, 2 Lev. 56. Covenant upon a charter party.

Cooker v. Child, 2 Lev. 74. Debt upon an indenture of charter party.

Rea v. Barnes, 2 Lev. 117. Debt upon a charter party.

Burdet v. Thrule, 2 Lev. 126. Action for account by merchant against factor.

Fowk v. Pinsacke, 2 Lev. 153. *Assumpsit* for premium on policy of marine insurance.

Hall v. Huffam, 2 Lev. 188, 228. *Assumpsit* for price of goods sold.

Cole v. Shallet, 3 Lev. 41. Covenant on charter party.

Coke v. Cretchet, 3 Lev. 60. Prohibition to stay suit in Admiralty for mariner's wages.

Boson v. Sandford, 3 Lev. 258. Case against the proprietors of a general ship for damage to cargo.

Kempe v. Andrews, 3 Lev. 291. Trover for ship freightment.

Horton v. Coggs, 3 Lev. 296. Case on the custom of London, to pay note payable to bearer.

Keech v. Knight, 3 Lev. 315. *Assumpsit* on sale of a vessel.

Jeffery v. Legender, 3 Lev. 320. *Assumpsit* on a policy of marine insurance.

These thirty cases are the only cases in all this period in which commercial matters are dealt with at all—in many of them only incidentally. They serve to shew, however, that the commercial community was alive, was chartering and insuring ships, selling goods at home and abroad, deal-

ing in bills of exchange and the like, much as their successors have done. There must have been thousands of such transactions. How comes it that they occupied the attention of the King's Court so little? It is often said that there was practically no commercial law before the time of Lord Mansfield, and that it was his ordering and exposition of that law which induced suitors to come into the Courts.²

I doubt very much if this is the true explanation. Contracts very similar to the modern contracts of affreightment, insurance, negotiable instruments, etc., and the well-known mercantile rules applying to them, had been known and must have been constantly acted upon amongst merchants for a thousand years. When we do get a glimpse of such transactions, during the period in question, they do not assume any questionable shape, but are spoken of by the Law Reporters as if everyone understood them. After all, Lord Mansfield's work was mainly equivalent to a codification of mercantile rules which had been understood and acted upon for centuries. Litigants do not, as a rule, care whether they are establishing a precedent or not. A mercantile jury is by no means a bad tribunal for deciding a mercantile case, and one would have thought that the more the law was systemised and reduced to rules quotable as precedents, the less litigation there would be. Otherwise codification of the law is of very doubtful utility.

I cannot help fancying that the true reason for the lack of commercial cases in the Supreme Court must have been that the merchants found that they could get their disputes settled elsewhere much more expeditiously and cheaply, and without the risk of defeat upon technicalities or the necessity of submitting to antediluvian forms of trial, which

² In his well known judgment in *Lickbarrow v. Mason*, 2 T. R. 63 (1786) Buller, J., says:

"We find in *Snee v. Prescott* that Lord Hardwicke himself was proceeding with great caution, not establishing any general principle, but decreeing on all the circumstances of the case put together. Before that period we find that in courts of law all the evidence in mercantile cases was thrown together; they were left generally to a jury, and they produced no established principle. From that time, we all know the great study has been to find some certain general principles, which shall be known to all mankind, not only to rule the particular case under consideration, but to serve as a guide for the future. Most of us have heard these principles stated, reasoned upon, enlarged and explained, till we have been lost in admiration at the strength and stretch of the human understanding. And I should be very sorry to find myself under a necessity of differing from any case on this subject which has been decided by Lord Mansfield, who may be truly said to be the founder of the commercial law of this country."

were the curses of the High Court. In the first place, it is evident from the large number of cases of error from and prohibition to the local Courts of Record that those Courts enjoyed a popularity which has long since waned. It would be interesting to examine the records of the Tolsey Court at Bristol, for instance, if they exist, and find out what class of cases were then being dealt with, and what number of them. The local Courts must have been much less expensive than the High Court and much more speedy; and the suitors possessed in the old practice of foreign attachment,³ a means of compelling the submission to the jurisdiction of the Court and of obtaining the fruits of their judgments, which the High Court did not possess. At any rate it is evident from the reports of Raymond and Levinz that these local Courts were much more active in their time than they afterward became.

Secondly, it is noticeable that during the period in question there are no less than thirty-two decisions upon matters arising out of arbitrations. This is a very large proportion. We are accustomed to think and say, to-day, that commercial business has deserted the Law Courts in favour of arbitration. I fancy that in the period with which we are dealing this must have been even more the case.

The next point that calls for attention in the list is that, although there are no less than 66 actions for slander, there is only one single case of libel. I imagine that, at this date, libel was practically always dealt with as a criminal and not as a civil matter.⁴

³ See *Mayor of London v. Cox* (1866), L. R. 2 H. L. 239.

⁴ This question as to how and when the High Court in England came to deal with actions for defamation is rather perplexing. Under the Statutes *Circumspecte Agatis* (1283. 13 Edw. I) and *Articuli Cleri* (1315-1316, 9 Edw. II) jurisdiction in cases of defamation is clearly reserved to the Ecclesiastical Courts. Nevertheless, at a very early date, the local Manorial Courts seem to have entertained suits for defamation, sometimes as a penal, and sometimes as a civil matter (Holdsworth, Vol. II, pp. 319 *et seq.*). But, as far as present research has gone, all the cases dealt with seem to have been for oral defamation, or slander.

At some period which is uncertain, but which is generally supposed to date from the weakening of the Ecclesiastical Courts from the Reformation, the King's Courts accepted jurisdiction to deal with oral defamation. The Ecclesiastical Courts continued, however, for centuries, to retain a jurisdiction to deal with cases of defamation which were not actionable at Common Law, as for mere abuse, calling a woman "a whore" and the like, and the books are full of cases where prohibition was applied for to prevent them from exceeding their jurisdiction in this respect. At any rate, from the beginning of the Elizabethan Reports, Coke, Croke, Yelverton, etc., the Law Reports are full of cases of slander, mostly of the

Actions for personal negligence amount to only two, and for deceit to only one. I see no way of accounting for this deficiency. It presents a curious contrast to modern cause lists, and one would have thought that men must have been careless and untruthful at this date as well as later. Actions for work and labour are also very scarce. Three hundred and fifty-nine cases, or more than a fourth of the whole number, relate to questions arising out of the ownership of land; though it is noticeable that only eight of these have reference to nuisances or incorporeal hereditaments. The great majority were questions as to the effect of various forms of limitation of estates.

Two matters are worthy of notice to those who are interested in the development of legal ideas, viz., (1) the manner in which lawyers were feeling their way to a clear idea of what amounted to a wrong for which an action on the case would lie, and (2) the gradual working out of the doctrine of *assumpsit*, including the idea of consideration as a necessary element in contractual relations:

I. Maliciously setting the law in motion.

(a) Criminally.

Low v. Beardmore, Sir T. R. 135. Action on the case against the defendant for falsely and maliciously indicting the plaintiff for a *rescous*; and on not guilty found for the plaintiff, Powis, for the defendant, moved in arrest of judgment, that such an action on the case doth not lie for indicting one for a bare trespass, and this indictment was but a trespass. The Court seem to have come to no conclusion,

most trumpery description. At about the same time the Star Chamber seems to have undertaken to deal with cases of libel, but solely from a penal point of view.

Actions for libel in the High Courts, however, are practically non-existent. I have searched both King's Bench and Common Bench Reports from Elizabethan times down to the end of Modern Reports, which takes us well into the reign of George the Second. In all that period, though there are several cases referring to indictments, informations or penal bills for libel in the King's Court or the Star Chamber. I have found only three cases of civil actions for libel, viz., *Eyres v. Sedgewicke*, Cro. Jac. 601 (18 Jac. I); *Lake v. King*, 1 Lev. 139 (20 Car. II); and an *Anonymous Case*, 11 Mod. 90 (5 Anne). It is noticeable that the first of these cases was for making a false affidavit in Chancery by reason of which the plaintiff was imprisoned; and the second was for presenting a false petition to Parliament accusing the plaintiff of malversation in his office of Vicar-General. The last of the three cases alone was an ordinary straightforward libel of the modern kind. During all this period the books are full of cases of oral defamation.

This is not altogether easy of explanation. It seems plain that the King's Courts had jurisdiction to try ordinary cases of libel. In the case of *Peacock v. Reynal* (10 Jac. I, 1612), reported in

but the point was evidently not considered settled, a case being quoted in the Exchequer Chamber against the plaintiff.

Henley v. Burstal, Sir T. R. 180. Action upon the case for maliciously indicting the plaintiff, being a justice of the peace, for delivering a vagrant out of custody, without examination, contrary to law. Upon not guilty pleaded, a verdict found for the plaintiff; and Swain moved for the defendant in arrest of judgment, that such action doth not lie, because it deters a man from prosecuting for the King. Maynard Serjeant for the plaintiff. Where the indictment is preferred maliciously, and such indictment contains matter of imputation and slander as well as crime; there the action lies; but otherwise where the indictment contains crime without slander, as forcible entry, etc., but here is slander as well as crime; and of that opinion was all the Court; and judgment was given for the plaintiff.

(b) In the Ecclesiastical Court.

Gray v. Day, Sir T. R. 418. An action upon the case. The plaintiff declares, that he being church-warden of such a parish, and having given an account at the end of his year to his successor, and the parishioners; the defendant falsely and maliciously cited him into the Ecclesiastical Court to render an account, and there at the defendant's request the Judge excommunicated the plaintiff for not rendering the account. Upon not guilty pleaded, and verdict for the plaintiff, Saunders moved in arrest of judgment, because the sentence was given by the Judge, and so he and the

2 *Brownlow & Goldsborough* 152, which appears to be a report of proceedings in the Star Chamber, after stating the nature of the libel alleged in the bill of the plaintiff exhibited in the Star Chamber, the report proceeds: "And it was agreed that this was a libel, and for that the defendant was fined to £200 and imprisonment according to the course of the Court, and the plaintiff let loose to the common law for his recompense for the damages he hath sustained."

It is probable that in some cases a cause of action which we should now call an action for libel was wrapped up in an action on the case of a rather indefinite character. See the cases of *Sheppard v. Wakeman*, 1 Lev. 53, and *Coze v. Smithie*, 1 Lev. 119, set out post at pp. 363-4. and, indeed, the two cases of *Eyres v. Sedgewicke* and *Lake v. King*, *supra*, in which the damage resulting from the libel is stated as the gravamen of the case rather than the libel itself. Nevertheless even these cases are so rare that I cannot help thinking that, as a rule, libel was dealt with as a criminal and not as a civil matter. It is noticeable, in this connection, that in the well known report of Coke, *The Cas de Libellis Famosis*, 5 Co. R. 125 a (3 Jac. I.), there is no suggestion that a libel could give rise to anything but a penal proceeding.

Court were to blame, and not the defendant. But resolved the action lies; and judgment was given for the plaintiff.

Hoskins v. Matthews, 1 Lev. 292. Case, for that the defendant falsely and maliciously, without any reasonable cause, cited and excommunicated him in the Ecclesiastical Court. After verdict, it was moved in arrest of judgment, that it does not appear for what cause the suit there was. But, *per Cur*, it is said and found to be falsely, and without any cause; and the action lies, and judgment was for the plaintiff.

(c) Malicious Civil Proceedings.

Stribler v. Jones, 1 Lev. 275. Case, and declares, that the defendant falsely and maliciously devising to damnify him, and to hinder him from going about his affairs, sued a *latitat* against him out of the King's Bench in trespass, with *ac etiam assumpsit* for 500 l. and caused him to be arrested and imprisoned for such a time, whereas in truth he had not any cause of action, *vel saltem non tantum causam actionis*. After verdict for the plaintiff, it was moved in arrest of judgment, that it is not positively said, that he had not cause of action; but none, or at least not so great; and it is not so great if it fails but of 1s. of so much. But the Court to the contrary, it is found to be done maliciously, wherefore judgment was ruled for the plaintiff.

Webster v. Haigh, 3 Lev. 210. Case for that the defendant wickedly intending and maliciously contriving *ipsum minus rite praegravare, & tam per corporis imprisonment' quam alias labores & expensas, praetextu justitiae & legis processus defatigare opprimere & depauperare & multipliciter praegravare & damnificare ex malitia sua praehabit' tali die & loco, virtute cujusdam brevis de quo minus e Cur'*, *Scaccar' sine aliqua rationabili causa arrestari & imprisonari subdole fraudulenter & injuste causavit, & in prisa detineri procuravit*, until he gave a warrant of attorney to confess a judgment for 20 l. in the King's Bench, Common Pleas, or Exchequer, whereby he had and suffered damages to 40 l. To this the defendant demurred generally; and now it was argued for the defendant, that no action lies for suing in a proper Court; for a man may mistake his own case, and think he has a good cause of action where it proves otherwise; and here the declaration does not say, that he knowing he had no cause of action sued. . . . But for the plaintiff it was argued, that the action lies as

it is laid here; for it is said, the action was brought *ex malitia praehabita, & sine aliqua causa rationabili ipsum damificare*, which implies the *knowing* he had no cause of action; and this is confessed by the demurrer. . . . And here Charlton held *totis viribus*, that the action did not lie because the law had provided another remedy, viz., costs. But Jones, Chief Justice, and Justice Street held, that the action lay for the unjust, causeless, and malicious vexation premeditated, all which are confessed by the demurrer. Levinz doubted, because it is not expressly said, *knowing he had no cause of action*; but he inclined, that the action lay, because the defendant had compelled the now plaintiff to give him a judgment for 20 l. whereby he is deprived of his remedy by costs, etc. But it was adjourned.

It will be noticed that in these cases the law is in a state of fluidity. It is apparently not settled either what constitutes the cause of action, or for what reason. But very shortly afterwards, in the case of *Savile v. Roberts*, in the Exchequer Chamber, 1 Lord Raymond 374 (9 Wm. III.), the judgment of Holt, C.J., lays down the law very nearly in accordance with modern ideas. In that case the declaration was drawn (omitting verbiage) substantially in the modern form, and alleges all that it would be necessary to allege in a similar case at the present day, viz., that Savile "*machinans et nequiter et malitiose intendens ipsum Jacobum (Roberts) minis rite praegravare, etc. . . . sine causa rationabili, ex malitia sua praecogitata apud Barnesley in comitatu praedicto apud generalem quarterialem sessionem pacis coram, etc. . . . de eo quod ipsi secundo die Octobris anno regni domini Willelmi tertii Dei gratia nunc regis Angliae, etc., septimo, vi et armis apud Beneby praedictam in le West Riding comitatus praedicti riotose routose illicite et injuste sese assemblerunt et congregaverunt, etc. . . . fals' indictari malitiose fecit et procuravit, ac indictamentum illud versus ipsum Jacobum Roberts falso et malitiose prosecutus fuit et prosecutum esse causavit, quousque idem Jacobus Roberts postea, etc. . . . debito modo secundum legem et consuetudinem hujus regni Angliae inde acquietatus fuit. . . . Quorum quidem praemissorum praetextu idem Jacobus Roberts non solum in bonis nomine fama credentia et aestimatione suis praedictis quibus praecantea gavisus fuerit magnopere laesus ac in diversis negotiis licitis et honestis agendis mul-*

tipliciter impeditus existit, verum etiam idem Jacobus valde graves et arduos labores subire et diversus denariorum summas pro acquietatione sua praedicta et ejus exoneratione in hac parte expendere et erogare coactus et compulsus fuit, ad damnum ipsius Jacobi Roberts viginti librarum, etc."

I have set the material passages of this declaration out at length because it shews such a surprisingly sudden advance from the inchoate, tentative, and jerky declarations in the cases previously cited, and, in fact, is just in the form in which a similar cause of action would be alleged in England in the present day. All the necessary ingredients are stated, viz., that Savile falsely and maliciously and without reasonable and probable cause presented and prosecuted an indictment against Roberts, that Roberts was acquitted and suffered damage, in reputation and in pocket. As the earliest of the cases previously cited was in 17 Car. II. (1667), and the latest in 1 Jac. II. (1685) and the case of *Savile v. Roberts*, was in 9 Wm. III. (1702), the advance in legal conception by the pleader is remarkable, especially as the law was still quite uncertain. In the case of *Savile v. Roberts* there was a verdict for the plaintiff; defendant then moved in arrest of judgment and the case was argued two or three times at the bar of the Court of Common Pleas, and then there was a division of opinion in the Court, Neville and Powell, JJ., holding that the action would well lie, but Treby, C.J., being of the contrary opinion. Whereupon the case was taken on error to the Exchequer Chamber, where the Court, under the guidance of Holt, C.J., were unanimous in favour of the plaintiff, Holt, C.J., saying: "that this point is no *primae impressionis*, but that it has been much unsettled in Westminster Hall, and therefore to set it at rest is at this time very necessary."

He then proceeds to expound the law, to a great extent as it would be laid down at the present time, and draws the distinction between a malicious criminal prosecution and malicious civil proceedings very much as was subsequently decided by the Court of Appeal in *The Quartz Hill Consolidated Gold Mining Co. v. Eyre* (1883), 11 Q. B. D. 674, in which the judgment of Holt, C.J., is quoted as the standard pronouncement on the subject.

2. Malicious Injury to Reputation.

Mason v. Jennings, Sir T. R. 401. In a special action upon the case. The plaintiff declares, that he is a hackney-

coachman, and that the defendant with an intent to disgrace him did *ride Skimmington*.⁵

In *Cropp v. Tilney*, 3 Salk. 225, Holt, C.J., who is not often caught tripping, says: "As for instance, an action was brought by the husband for riding Skimmington, and adjudged that it lay, because it made him ridiculous, and exposed him," and he gives it as an example that in an action for libel it is sufficient that the alleged libel should make a man ridiculous. And this is quoted in all the text-books to the present day, ignoring the fact that in at least two cases "riding Skimmington" had been held not to be actionable. How such a proceeding could be a libel it is difficult to see, and as no special damage was alleged it would not be actionable as a slander.

3. Miscellaneous Actions for Damage Arising from False-Statements.

Sheppard v. Wakeman, 1 Lev. 53 (14 Car. II.). Case, where the plaintiff was to be married to such a one who intended to take her to his wife; the defendant falsely and maliciously to hinder the marriage, writ a letter to the said person, that the plaintiff was contracted to him, whereby she lost her marriage. After verdict for the plaintiff, it was moved, that the action did not lie, the defendant claiming title to her himself, like as *Gerrard's Case*, 4 Co., for slander of title. But after divers motions, the plaintiff had judgment, for it was found to be malicious and false; and if such an action should not lie, a mean and base person might injure any person of honour and fortune by such a pretence.

Coxe v. Smith, 1 Lev. 119 (15 Car. II.). Case for that he being an officer of the Custom House, the defendant made a false affidavit against him in Chancery, touching malfeasance in his office; and afterwards petitioned the commissioners of the Customs against him, and thereupon caused him to be turned out of his place; after a verdict (upon not guilty) for the plaintiff, it was moved in arrest of judgment, that no action lies for the making of a false oath, Owen 258. 2 Cro. 601. Hutt. 11. Poph. 144. 1 Leon 107, and that no action lies for the petition, because it is done in a course of justice. But (said) by the Court. The action is not founded on the oath, nor on the petition,

⁵ For "riding Skimmington" see Butler's "Hudibras," Part II, Canto II, lines 560-712.

but those are only inducements to prove the malicious procurement to have him turned out of his place; and that it was falsely and maliciously done, is now found by the verdict; and they gave judgment for the plaintiff.

Ekins v. Tresham, 1 Lev. 102 (15 Car. II.). Case, that whereas the plaintiff and defendant were in treaty for the sale of a messuage; the defendant falsely and fraudulently affirmed it was let at £42 per annum; whereto the plaintiff gave faith, gave him £500 for it, where in truth it was let at £32 per annum only. After verdict for the plaintiff, it was moved in arrest of judgment, that the action did not lie, as for saying that a thing is of greater value than it is, without warranty no action lies, Yelv. 20. No more will it for saying that it is demised for more than in truth it is; for the party might inform himself from the tenant, and a warranty will not bind a man in a thing that is apparent; as to warrant that a horse has both his eyes, when he is apparently blind in one of them. But by the Court, though an action will not lie for saying, that a thing is of greater value than it is (nor by Wyndham, it is perjury to swear it, because value consists in judgment and estimation, wherein men many times differ). Yet to affirm that a thing is demised for more than it is, is a falsity in his own knowledge, and the party who is deceived, may for such deceit have an action, for perhaps the lease is by parol, or the tenant will not inform the purchaser what rent he gave. And after it had been twice moved, judgment was given for the plaintiff in Trinity, 15 Car. II., by the whole Court.

Cooper v. Witham, 1 Lev. 247 (20 Car. II.). Case against the husband and wife, for that she being covert, affirmed herself to be sole, and requested the plaintiff to marry her, and lays it to be done maliciously, with intent to deceive him; whereupon he married her, whereby he was disturbed in conscience, and put to great charge by the husband. After a verdict for the plaintiff on (the issue) not guilty, it was moved in arrest of judgment, that the action does not lie; for the wife cannot by any contract or agreement charge the husband, and if he should be charged here, it would be by the wife's contract with the plaintiff to marry him; but for trespass or words she might charge the husband, for that she may do without assent of the husband or any other; and if damage ensue thereupon, it ought to be recompensed by somebody, and no other can do that

but the husband. But this marriage could not be made without the assent and contract of the plaintiff (himself) and therefore it shall not charge the husband, and so held the Court, and gave judgment for the defendant; they also said, that this was felony in the wife, and Twysden said, that an action did not lie for the master for beating his servant to death, for that he lost his service; for the party ought to be indicted for it, as is Yelv. 90. But see Latch 144, *Markham against Cobb*, Style 346, 347. *Dawes against Coveleigh*, that trespass lies for a felonious taking money after the party has been convicted and burnt in the hand; also it was here said, that the wife had been pardoned of the felony, but that did not appear upon the record; and if she had, yet the fact sounding in contract, it seems that the action does not lie.

The first two of these cases present a curiously hybrid appearance. At the present day they would take the form of actions for libel, *simpliciter*, if they disclosed any cause of action at all. As in fact framed, they are a kind of hybrid between an action for libel and an action for a wrongful procuring of an act to be done by another by means of a false statement. The two latter cases are cases of deceit, practically in the modern form, and shewing that the Courts already appreciated the distinction between an actual false representation and a mere puffing of wares or property.

4. Actions upon the Case against a Public Official for Breach of a Public Duty.

Starling v. Turner, 2 Lev. 50 (24 Car. II.). Case, and declares that by the custom of London, the bridge-master is chose by plurality of voices of the freemen, and that if the electors are so divided, that the majority cannot be known by the view, that the mayor ought to grant a poll; and that Starling being mayor, where upon the election the majority could not be known, refused to grant a poll to Turner, a candidate at that election, by which he lost the office. After verdict and judgment for Turner, plaintiff in the Common Pleas, error was brought in B. R. and assigned for error, that the action lies not, because it is not shewn that he had been elected if a poll had been granted. *Sed non allocatur*. For the mayor did not do his duty, and 'tis said by that he lost the office, which after verdict is sufficient; and of that opinion were all the Judges of the Com-

mon Pleas, but Vaughan, Chief Justice. *Note.* It was not a question in either of the two Courts, whether an action of the case would lie, for the bare denying or refusing of a poll, and returning another? But this seemed to be admitted by both Courts.

Herring v. Finch, 2 Lev. 250 (31 Car. II.). Case; whereas the plaintiff was a freeman, and had a voice in the election of mayors, the defendant, the present mayor refused to receive his vote; and now upon issue and trial the plaintiff was nonsuit, but the roll not marked for double costs. And now the defendant moved to have double costs, which was opposed, because it does not appear whether the plaintiff was nonsuit for want of proof that the defendant was the present mayor. 2. The statute gives double costs where the officer is sued for matter done by him in doing his office, and this suit is for *non fezans* in his office. *Cur'*. This case is not within the intent of the statute; the scope whereof was, that whereas mayors, etc., were sued for false imprisonment, or such matters, wherein they ought to justify that they may plead the general issue, and shall have double costs, but not in such cases as this.

The actual point reported in this case is not of importance except that it is interesting to see how far back the protection to public officials extends. But in his famous judgment in *Ashby v. White*, *Ld. Raym.* 938 (2 Anne), Lord Holt, C.J., says of this case:

"So in the case of *Herring v. Finch*, nobody scrupled but that the action well lay, for the plaintiff was thereby deprived of his right."

Bernardiston v. Some, 2 Lev. 114 (26 Car. II.). Case, and declares that a writ issued out of Chancery to the defendant, then Sheriff of Suffolk, to elect a knight of the county for the Parliament, and that the plaintiff was chosen by the majority of the freeholders, and that the defendant returned the writ with an indenture of the said election, but maliciously intending to deprive the plaintiff, *de fiducia & praed' falso & deceptive, una cum indentura praed' retornavit unam alteram indenturam in Cancellaria praed' specificiant' quod aliae personae liberi tenentes vel major pars liberorum tenentium elegerunt quendam Lionellum Tolmach, ubi revera praed' Lionellus non fuit electus per majorem numerum liberorum tenentium, ratione cujus* the plain-

tiff was kept out of the House of Commons, and put to great charge to prove his election in the House of Commons. The defendant pleaded *non culp.* and upon trial at Bar, Twysden Rainsford and Wylde held, and so directed the jury, that if this double return was made maliciously, they ought to find for the plaintiff, which accordingly they did, and gave him £800 damages, though the evidence as to the malice and falsity was very slender. . . . And now it was moved in arrest of judgment by North Attorney-General, and Scroggs, King's Serjeant, that this action lies not. . . . First, because the falsity or verity of the return is only examinable in the House of Commons, who are the sole judges, and will punish such falsities, and accordingly they have so done in this case, by committing the sheriff. . . . Secondly, the right of the party is not considerable in this case for this is not an office of profit, but of trust concerning the State. Thirdly, what the sheriff does in this case, he doth as a judge; for he is a judge of the election, and therefore no action lies against him. Fourthly, . . . the sheriff hath done no more in this case than laid the matter before the House of Commons, that the validity of the votes may be there deliberately examined. To which it was answered by Maynard, King's Serjeant, and Sir William Jones, solicitor: First, that there was malice and falsity in the sheriff, and thereby damage and charge to the plaintiff, and all this was found by the jury, which is sufficient to maintain an action in all cases, whether there has been a like action in such case or no before; for actions upon the case are founded upon the particular case, which is mostly new. . . . Secondly, the commitment by the Parliament is only to punish the contempt of the sheriff as to them and the State, but not to repair the party for the damage he sustained. . . . Thirdly, the sheriff is not a judge of the election in this case, but a minister to take the polls, of which in point of sufficiency the House of Commons is judge. . . . *Et adjournatur ad proximum terminum*, when Hale being in Court, he, Twysden and Wylde, for as much as the return is said to be *falso & malitiose & ea intentione* to put the plaintiff to charge and expense, and so found by the jury, held the action lay, and gave judgment for the plaintiff, Rainsford doubting; upon this a writ of error was brought in the Exchequer-Chamber, where, by North Chief Justice, and five other

Judges against two, the judgment was reversed upon the matter in law, that the action lies not.⁶

This batch of cases is interesting as shewing that, even at this period, the Courts had practically arrived at the conclusion, afterwards categorically affirmed in the well-known case of *Ashby v. White, supra*, that an action on the case lay for the bare infringement of a positive legal right, even where no damage in fact could be established—*ubi jus ubi remedium*. It is perhaps, however, worth observing that the pleaders had apparently not yet made up their minds exactly as to what the cause of action was, as, even in the case of *Ashby v. White*, it was alleged that the defendants "contriving, and fraudulently and maliciously intending to damnify him, the said Matthias Ashby, in this behalf," did then and there hinder him, the said Matthias Ashby, etc. They seem to have thought that it was necessary to allege and prove that the act of the defendant had been done maliciously and dishonestly, as in the case of malicious prosecution—whereas, in fact, such allegation was wholly immaterial, except possibly in the case of the double return.⁷

5. Actions upon the Case against Private Persons for Breach of a Duty arising from a Contractual Relation.

Mors v. Slue, Sir T. R. 220, 1 Vent. 190, 238 (24 & 25 Car. II.). (The pleading is taken from the report in Ventris). An action upon the case was brought by the plaintiff against the defendant; and he declared, that whereas according to the law and custom of England, masters and governors of ships which go from London beyond sea and take upon them to carry goods beyond sea, are bound to keep safely day and night the same goods, without

⁶ It would have been interesting to see the judgment in this case in the Exchequer Chamber, but in the only report that I can find of it, Pollexfen 470, only the judgment of one of the Judges in the minority is given.

⁷ I suspect that there may have been another reason for this. It was a rule of the old procedure that "in no case where a contempt, deceit, trespass, or injury is supposed in the defendant, shall he wage his law." Bac. Abr.; Wager of Law, p. 350, quoting 1 Inst. 295 a. Now one of the great objects of pleaders in old days was to avoid framing a case in such a way that the defendant could wage his law. It may be that when they invented the new formula of trespass on the case, they garnished their pleading with these irrelevant expletives in order to make sure that under the new form of action the defendant should not be allowed to wage his law.

loss of subtraction *ita quod pro defectu* of them, they may not come to any damage; and whereas the 15th of May last, the defendant was master of a certain ship called "The William and John," then riding at the port of London, and the plaintiff had caused to be laden on board her three trunks, and therein 400 pairs of silk stockings, and 174 pounds of silk, by him to be transported for a reasonable reward of freight to be paid, and he then and there did receive them, and ought to have transported them, etc., but he did so negligently keep them, that in default of sufficient care and custody of him and his servants, the same were totally lost out of the said ship.

Upon not guilty pleaded, the jury found a special verdict, viz., that the defendant was master of a ship which lay in the river of Thames, near St. Katherine's, that the plaintiff delivered goods to him to transport. That the defendant received his salary from the owner of the ship; that there being three men and a boy in the said ship, persons unknown, about eleven o'clock in the night came on board with a pretended warrant to search for felons, and seized upon the persons in the ship, and took away the goods; and whether the defendant was guilty was the question, viz., whether the master or owner of the ship should answer these goods; and resolved for the plaintiff.

Virtue v. Bird, 2 Lev. 196 (29 Car. II.) Case that whereas the defendant had hired him to carry a load of timber from Woodbridge to Ipswich to be laid there at any place the defendant should appoint, and that he gave notice to the defendant that he would carry it such a day, and requested the defendant at Woodbridge to appoint where it should be laid, and that accordingly he carried it to Ipswich and the defendant appointed no place where it should be laid, but made the horses of the plaintiff being hot stay so long in the cart, that they took cold, whereby some of them died and the rest were spoiled; and after verdict for the plaintiff, upon *non culp.*, judgment was stayed, because the action lies not; for, first, he might have taken his horses out of his cart, and have walked them up and down, or put them into the stable. 2. As soon as he came there, and found no place appointed by the defendant, he might have unladen the timber in any convenient place, and returned; and therefore the injury which the horses received is owing to himself, and through his own default.

Boson v. Sandford and Others, 3 Lev. 258 (1 William and Mary). Case against the defendants, proprietors of a ship, wherein goods are usually transported for hire; and that the plaintiff loaded goods on board the said ship to be carried for hire from London to Topsham in Devonshire; and that the defendants received them and undertook to carry them to Topsham, but that they not being careful therein, but neglecting their duty, did so carelessly place and carry the goods, that though the ship arrived safely at Topsham, yet the goods were spoiled; and on not guilty the jury found a special verdict, viz., that ten other persons besides the defendants are proprietors and part-owners of the ship; that the ship had a master placed in her by the part-owners, who had £60 wages for every voyage between Topsham and London; that the goods were delivered to the master, none of the part owners being present, and that no contract was made with them or any for the plaintiff, that the ship should arrive safe at Topsham, but that the goods were spoiled by negligence, etc. And if for the plaintiff, for the plaintiff; and if not, for the defendant. And two questions were made in this case: 1. Whether the proprietors are chargeable, no contract being made with them, for that here was a master who was chargeable in respect of his wages, as in the case of *Mors and Slue*, lately adjudged in this Court. And as to this point Holt (now Chief Justice) held clearly, that though the master be chargeable in respect of his wages, so are the proprietors also (in respect of the freight, which they received for the carriage of the goods) at the plaintiff's election. 2. Whether the action lay against the defendants only, it appearing there are other part-owners, who are not made defendants; and he held that the action did not lie, except it were brought against all the part-owners, for they are all chargeable in respect of their (joint) profit made by the carriage, and that in point of contract upon their (joint) undertaking, be it either expressed or implied; and they are not chargeable as trespassers, for then one of them might be charged alone, but in point of contract upon their receipt of the goods to be carried for hire, and so has the plaintiff laid it in his declaration, viz., that they undertook to carry them, etc. (See the considered judgment in this case in Shower 29).

Horton v. Coggs, 3 Lev. 295 (2 William and Mary). London, to wit.—John Coggs, late of London, goldsmith,

was attached to answer Edward Horton *of a plea of trespass upon the case, etc.* The plaintiff declares of a custom in London, that if any merchant, or other person merchandizing in London, makes a note in writing under his hand, and thereby promises to pay any sum of money therein mentioned to the person therein named, or to the bearer; and if the person named in the note, to whom by the note it is promised to be paid, shall assign or deliver it to another person to receive it to his own use, and he carries it to the drawer of the note, and requests him to pay it to him that brings it, that then the person who makes the note is chargeable to pay it to the bearer; and that the defendant being a goldsmith made such a note, thereby promising to pay £55 to William Barlow, or the bearer; and that Barlow delivered the note to the plaintiff to receive the money to his own use, in satisfaction of the said £55 due to him by Barlow, and that the plaintiff carried and shewed it to the defendant, whereby the defendant, according to the custom aforesaid, became liable and was liable to the payment of the said £55 upon the said note to the plaintiff; and so being liable the defendant afterwards, in consideration of the premises, upon himself assumed and to the plaintiff then and there faithfully promised that he the defendant the said £55 to the plaintiff would well and faithfully pay and content.

. . . Nevertheless the defendant, his promises and assumptions aforesaid not regarding, but contriving and fraudulently intending the plaintiff in this behalf craftily and subtilly to deceive and defraud, the said £55 . . . hath not paid, etc. And the *defendant comes and defends the force and injury when, etc., and saith that he did not assume upon himself in the manner and form as the plaintiff above complains of him, etc.* After a verdict for the plaintiff it was moved in arrest of judgment, that this custom to pay to the bearer was too general; for perhaps the goldsmith before notice by the bearer had paid it to Barlow himself. And of that opinion, after divers motions were Pollexfen, Powell, and Rokesby, (Ventris dying in the last vacation); though upon the trial of the cause before Pollexfen at the Guild Hall he then held, that the action well lay this matter having been objected at the said trial. *Levinz* of counsel for the plaintiff.⁸

⁸In consequence of this decision and subsequent decisions of Lord Holt, refusing to recognize promissory notes as negotiable (see *Clerk v. Martin*, 2 Ld. Raym. 757) a statute was passed (3 & 4 Anne. c. 9), which placed promissory notes on the same footing in this respect as bills of exchange.

Panton v. Isham, 3 Lev. 359 (5 William and Mary). Case, and declares on the custom of the realm, that every one ought to keep their fire so, that by default thereof no damage should happen to another and that the defendant so negligently kept his fire, that six stables, six hay-lofts, and three lodging rooms of the plaintiff were thereby burnt. The defendant pleads not guilty, and on a special verdict it was found, that the plaintiff was seised of the stables, etc., and demised one of the stables to the defendant for a week for 8s. and so from week to week at 8s. per week, as long as both parties should please, and demised the other five stables to divers other persons for divers terms yet to come, whereby they were possessed; and being so possessed, the fire, by the defendant's negligence, six weeks afterward begun in the stable demised to the defendant, and burnt the same and all the other stables, etc. And if for the plaintiff, for the plaintiff, etc. Damages £100 and tax the damages severally, viz., £15 for the stable demised to the defendant, and £85 for the others, and costs 20s. And upon several arguments last term and this term, judgment was given for the plaintiff for the £85 and for the defendant for the £15 . . . Secondly, that for the stable demised to the defendant himself, no action lay; for the demise to him could be no more than a term for three weeks, and for the residue he was tenant at will, against whom no action lay for negligent waste, as 5 Co. 14, *The Countess of Shrewsbury's Case*. But, thirdly, as to the stables demised to the other, the action well lies, as if they were the stables of strangers, and not of the lessor; for as to them there is no privity between the plaintiff and the defendant. . . . Fourthly, although the other stables, etc., were in lease to others, who may have an action as to the possession for their losses, yet the lessor may also have an action for damages to his inheritance, as was formerly adjudged in this Court in the case of *Beddingfield* against *Onslow*, 3 Lev. 209.

Coggs v. Bernard, 2 Ld. Raym. 909 (2 Anne).⁹ In an action upon the case the plaintiff declared *quod cum Bernard* the defendant, the 10th of November, 13 Will. 3, etc., *assumpsisset, salvo et secure elevare, Anglice*, to take up certain hogsheds of brandy then in a certain cellar in D.

⁹ This case is inserted, although it is in date just outside the period that we are dealing with, because it so exactly raises the difficulty of the distinction between contract and tort dealt with below.

et salvo et secure deponere, Anglice, to lay them down again in a certain other cellar in Water-Lane, the said defendant and his servants and agents, *tam negligenter et improvide* put them down again into the said other cellar, *quod per defectum Curæ ipsius* the defendant, his servants and agents, one of the casks was staved, and a great quantity of brandy was spilt. After not guilty pleaded, and a verdict for the plaintiff, there was a motion in arrest of judgment, for that it was not alleged in the declaration that the defendant was a common porter, nor averred that he had any thing for his pains. . . . Gould, Justice. . . . The reason of the action is, *the particular trust reposed in the defendant, to which he has concurred by his assumption, and in the executing which he has miscarried by his neglect.* . . . Powell, J. . . . Now to give the reason of these cases, the gist of these actions is the undertaking. The party's special *assumpsit* and undertaking oblige him so to do the thing, that the bailor come to no damage by his neglect. Holt, Chief Justice. . . . There has been a motion in arrest of judgment, that the declaration is insufficient because the defendant is neither laid to be a common porter, nor that he is to have any reward for his labour. So that the defendant is not chargeable by his trade, and a private person cannot be charged in an action without a reward.

I have had a great consideration of this case, and because some of the books make the action lie upon the reward, and some upon the promise, at first I made a great question, whether this declaration was good. But upon consideration, as this declaration is, I think the action will well lie. . . . (He then delivers his famous disquisition on bailments). The reasons are, first, because in such a case, a neglect is a deceit to the bailor. For when he instructs the bailee upon his undertaking to be careful, he has put a fraud upon the plaintiff by being negligent, his presence of care being the persuasion that induced the plaintiff to trust him. And a breach of trust undertaken voluntarily will be a good ground for an action. I Roll. Abr. 10. . . . There the case was an action against a man, who had undertaken to keep an hundred sheep, for letting them be drowned by his default. And there the reason of the judgment is given, because when the party has taken upon him to keep the sheep, and after suffers them to perish in his default; inasmuch as he has taken and executed his

bargain, and has them in his custody, if after he does not look to them, an action lies. For here is his own act, viz., his agreement and promise, and that after broke of his side, that shall give a sufficient cause of action.

But secondly it is objected, that there is no consideration to ground this promise upon, and therefore, the undertaking is but *nudum pactum*. But to this I answer, *that the owner's trusting him with the goods is a sufficient consideration to oblige him to a careful management*. Indeed if the agreement had been executory, to carry these brandies from the one place to the other such a day, the defendant had not been bound to carry them. But this is a different case, for *assumpsit* does not only signify a future agreement, but in such a case as this, it signifies an actual entry upon the thing, and taking the trust upon himself. And if a man will do that, and miscarries in the performance of his trust, an action will lie against him for that, though nobody could have compelled him to do the thing.

This series of cases is very instructive, possibly rather humiliating to English lawyers. The inheritors of the English Common Law are apt to boast that it is really much more scientific than the Roman Law—that the latter does not even recognize the distinction between contract and tort. These cases shew how nebulous the English distinction really is, and how illogical. A tort has been well defined as, theoretically, “a breach of duty (other than a contractual or quasi-contractual duty) creating an obligation, and giving rise to an action for damages.”¹⁰ According to this definition, there is only one of these cases which is really an action for tort, viz., *Panton v. Isham*. The others are all actions for breach of contract, because bailment is clearly a contract. Nevertheless, all these cases, with the exception of *Horton v. Coggs*, would be regarded in English law as actions of tort because the right plea for the defendant was “not guilty” instead of “*non assumpsit*.”

This is a good illustration of Maine's sage and oft-quoted maxim that “substantive law has at first the look

¹⁰ A Digest of English Civil Law, edited by Edward Jenks, Book ii, Part iii, by J. C. Miles, p. 326.

“Quasi-contractual” is here used, substantially, for the class of cases where an action on the money counts would have been available under the old system of pleading. It will be seen *infra* that, though this definition is theoretically correct, it does not accurately state the English law.

of being gradually secreted in the interstices of procedure.”¹¹ The action of *assumpsit* should, naturally, have been developed either from the old action of covenant or the old action of debt. It is quite easy to understand why it was not affiliated to debt, because in most actions of debt the defendant could wage his law. In covenant the defendant could not wage his law, but there were probably technical rules about the production of the document sued upon which rendered it inapplicable to an oral agreement. However this may be, in fact the action of *assumpsit* was developed from the action of trespass, through the medium of the action of *trespass on the case*. There is a good example of this in the pleadings in the case of *Horton v. Coggs, supra*. The defendant is “attached to answer Edward Horton of a plea of *trespass on the case*.” Then the declaration goes on to allege a cause of action in *assumpsit*, and the plea is *non assumpsit*. *Per contra*, in *Coggs v. Bernard, supra*, the declaration is apparently in *assumpsit*, and it is so treated by all the Judges in the case, yet the plea is not guilty; and for that reason in the comparatively modern case of *Corbett v. Packington*¹² it was held to have been an action in *tort* and not in *assumpsit*, the action of *assumpsit* having by this time come to be regarded as an action of contract, as opposed to an ordinary action of *trespass on the case* which was regarded as an action in *tort*.

There is no doubt that, because of their lineage, originally all actions which were nominally actions of trespass on the case were regarded as actions of *tort*, whether they arose from a breach of duty which was independent of contract, or whether the act complained of was a wrong only because it was a breach of contract. The next step was to draw a distinction between the cases of persons who followed a public calling such as common carriers or innkeepers, and the rest of the world, and to say that, if a man were sued, upon the custom of the realm, for the breach of a duty which he owed to all persons alike who dealt with him, and who were entitled to command his services, that was an action in *tort*; but that if he were merely a private person who was guilty of the breach of a particular engagement, then the action against him was in contract. This distinction is continually referred to in the cases above set out. It seems to me to have been practically disposed of by the

¹¹ Maine, *Early Law and Custom*, p. 389.

¹² (1827) 6 B. & C. 268, at p. 272.

cases of *Boson v. Sandford* and *Coggs v. Bernard*, *supra*. In the first of these cases the action was against the defendants as common carriers and the plea was not guilty. Nevertheless, it was held that it was an action for breach of contract, and that therefore some of the co-owners could not be sued without joining the others. In *Coggs v. Bernard* it was not alleged that the defendant was a common carrier, and that point was taken as one of the grounds for arresting judgment, but, nevertheless, it was held that the defendant was liable.

The ultimate rule adopted by the English Courts is thus stated by a very eminent Judge:

"The distinction between tort and contract is not a logical one, and it is sometimes difficult to say whether a particular thing is a wrong or a breach of contract. If the claim of the plaintiff is set out at large, pointing to some particular stipulation in the contract which has been broken, the action would be founded on contract; but where it is only necessary to refer to the contract to establish a relationship between the parties, and the claim goes on to aver a breach of duty arising out of that relationship, the action is one of tort."¹³

One may heartily agree with the learned Judge that the distinction is illogical. The breach of duty arises equally out of contract whether it is a breach of a duty imposed by the Common Law upon the parties to all contracts of a certain class, or whether it is a breach of a particular duty imposed upon the particular parties by the particular contract. The only logical distinction would seem to be between a breach of a duty which arises independently of contract altogether, and a breach of a duty which arises only because of a particular antecedent contract. The existing confusion is really the result entirely of the curious development of legal procedure in this country; and, to my mind, can only be understood by reference to such a group of cases as those collected above. The net result is that in England the same transaction may give rise both to a right of action in tort and to one in contract.¹⁴

6. Actions of *Assumpsit* shewing the Development of the Doctrine of Consideration.

¹³ *Per* Collins, L. J., in *Sacks v. Henderson*, 1902, 1 K. B. D., p. 616. See also *per* the same Judge in *Turner v. Stalkibrass*, 1898, 1 Q. B. 58.

¹⁴ See *Meuz v. The G. E. Ry. Co.* (1895), 2 Q. B. 387.

Traverse v. Meres, Sir T. R. 32 (13 Car. II.). The plaintiff declares, that whereas the husband of the defendant now dead, was indebted to the plaintiff, the defendant promised, that if the plaintiff would manifest and make appear that her said husband was indebted, she would pay it; and avers, that he had been at all times ready to manifest the said debt; and on *non assumpsit* found for the plaintiff. And Allen moved in arrest of judgment, that there is not any consideration, for that the wife was neither executrix or administratrix. Trin. 51, Rot. 1446, *Hunce v. Hinton*. The son of the defendant was indebted to the plaintiff, and the defendant promised upon forbearance to pay; and there judgment was for the plaintiff, because forbearance shall be taken for total forbearance. . . . *Twisden*, Justice. The difference is betwixt forbearance generally, there is a good ground of action, although the defendant be neither executor or administrator; but upon forbearance of the defendant it ought to appear that there was some cause of forbearance. Wild for the plaintiff. The making of the debt appear, is trouble and pains to the plaintiff, and therefore a good consideration. It was adjourned, and afterwards judgment was given for the plaintiff.

Benson v. French, 1 Lev. 98 (15 Car. II.). *Assumpsit* and declares, that he had arrested a woman for £20, and that she being in the custody of the bailiff at the defendant's house, the defendant in consideration that the bailiff would permit the woman to tarry at the defendant's house for one night, promised to the bailiff on the plaintiff's part, to deliver the woman to the bailiff the next morning, or to pay the £20. And that the bailiff permitted the woman to tarry there that night; but that the defendant did not deliver her to the bailiff the next morning, nor had he paid the £20. After verdict on *non assumpsit* for the plaintiff, it was moved in arrest of judgment by Wylde, the King's Serjeant, that the woman was either always in the custody of the bailiff (and then it was not any consideration), or out of his custody, and then it was an escape, and the consideration and promise were (then) both illegal. To which it was answered by Jones, that it might be for the ease of the woman to lie there that night, and so a good consideration, though never out of the custody of the bailiff; and if it be intended that she was out of the bailiff's custody, yet it shall be intended that it was by the plaintiff's assent, because the promise was made to the bailiff on the plaintiff's

part; and the plaintiff having brought the action it proves his assent, and his assent after is sufficient to make the promise good. And held by the Court, if it was an escape, the consideration and promise were both illegal; but they held that it was not any escape, but rather an undertaking that she should not except; and the promise being laid to be made to the bailiff on the plaintiff's part, it shall be intended that she was left there by the assent of the plaintiff. And they gave judgment for the plaintiff.

Quick v. Coppleton, 1 Lev. 161 (17 Car. II). *Assumpsit*. Whereas the defendant's late husband was indebted to the plaintiff, and she about to come to London, and being in fear to be arrested by the plaintiff, she promised him in consideration that he would not trouble her, and would forbear till Michaelmas, to pay, &c. After verdict, it was moved, that she not being shewn to be executor or administrator, the forbearance was not any consideration, which was agreed by the Court; but the subsequent words *forbear till Michaelmas*, are distinct and general, not only to forbear her but all others, and makes a good consideration, whether she be liable or not; and they cited *Heriot and Hinton's case* adjudged, that a general forbearance is a good consideration, whether the party promising be liable or not. . . . And Hyde Chief Justice held, that a forbearance to sue one who fears to be sued, is a good consideration; and he cited a case in the Common Pleas, when he sate there where a woman who feared that the dead body of her son would be arrested for debt, promised in consideration of forbearance, to pay; and it was adjudged against her, though she was neither executor nor administrator. But of this the other Judges doubted.

Harvy v. Gibbons, 2 Lev. 161 (27 & 28 Car. II). Error or a judgment in Shrewsbury Court, where the plaintiff declared, that he being bailiff to J. S. the defendant in consideration that he would discharge him of £20 due to J. S. promised to expend £40 in repairing a barge of the plaintiff's; verdict and judgment for the plaintiff, upon *non assumpsit* was reversed, the consideration being illegal, for the plaintiff cannot discharge a debt due to his master.

Tripps v. Rand, 2 Lev. 198 (29 Car. II.) *Assumpsit* in consideration the plaintiff at the defendant's request would procure himself to be made a knight at his own proper charges, so that his wife, the defendant's daughter, might be a lady, to pay him £2,000 and says, that he procured

himself to be knighted at his own charges, whereby his wife became a lady; yet the defendant had not paid him. After verdict and judgment upon *non assumpsit in Com. Banc.* it was now assigned for error in B. R. that it is not said the plaintiff procured himself to be knighted at the request of the defendant: it might be he did it of his own head, and the request here is part of the consideration, executory and traversable, and by omitting it the plaintiff (defendant?) hath lost his traverse of the request; and upon *non assumpsit* he was not obliged here to prove a request upon evidence, as are the cases in Hob. 88, 106, and for authority in point, 2 Leon. 53. 3 Leon. 91. *Curia contra*, The request shall be intended here to be made at the time of the promise; *scil.* that he then requested him to be made a knight, and promised to give him £2,000 and it shall not be intended that he promised to give him the £2,000 if he would procure himself to be made a knight when he should afterwards request him, and so the request is not executory, but executed at the time of the promise made: and they gave rule to affirm the judgment; but at the earnest motion of Jones Attorney-General, to be farther heard for the plaintiff in error, it was adjourned until next term, when the judgment was affirmed by the whole Court.

Dutton and Wife v. Poole, 2 Lev. 210 (29 Car. II). *Assumpsit*, and declares, that the father of the plaintiff's wife being seised of a wood which he intended to sell to raise portions for younger children, the defendant being his heir, in consideration the father would forbear to sell it at his request, promised the father to pay his daughter, now the plaintiff's wife, £1,000, and avers, that the father at his request forebore, but the defendant had not paid the £1,000. After verdict for the plaintiff upon *non assumpsit*, it was moved in arrest of judgment, that the action ought not to be brought by the daughter, but by the father; or if the father be dead, by his executors; for the promise was made to the father, and the daughter is neither privy nor interested in the consideration, nothing being due to her: also the father, notwithstanding this agreement with the son, might have cut down the wood, and then there was no remedy for the son, nor could the daughter have released the promise, and therefore she cannot have an action against him for not performing the promise, and divers cases were cited for the defendant, as *Yelv. Rippon v. Norton*, *Hawes v. Leader*, *Starky v. Milner*, 1 Roll. 31, 32, Sty. 296, and a

case lately resolved in *Com. Banc. inter Norris v. Pine, intrat.* Hill 22 & 23 Car. II, 1538, where the case was; *If you will marry me, I will pay your children so much*; and the action being brought by the children, adjudged it lay not. On the other side it was said, if a man delivers goods or money to H. to deliver on pay to B., B. may have an action, because he is to have the benefit of the bailment; so here the daughter is to have the benefit of the promise: so if a man should say, Give me a horse, I will give your son £10, the son may bring an action, because the gift was upon consideration of a profit to the son; and the father is obliged by natural affection to provide for his children; for which cause affection to children is sufficient to raise a use to them out of the father's estate; and therefore the daughter had an interest in the consideration; and in the promise; and the son had a benefit by this agreement, for by this means he hath the wood, and the daughter is without a portion, which otherwise in all probability the son would have been left to pay, if the wood had not been cut down, nor this agreement between him and his father, and for authorities of this side were cited, Roll. 1 Ab. 31, *Oldman v. Bateman*, and *ibid.* 32, *Starky v. Meade*. Upon the first argument Wylde and Jones Justices seemed to think, that the action ought to be brought by the father and his executors, though for the benefit of the daughter, and not by the daughter, being not privy to the promise, nor consideration. Twysden and Rainsford seemed *contra*; and afterwards two new Judges being made, *scil.* Scroggs Chief Justice in lieu of Rainsford, and Dolbin in lieu of Twysden, the case was argued again upon the reasons aforesaid; and now Scroggs Ch. Just. said, that there was such apparent consideration of affection from the father to his children, for whom nature obliges him to provide, that the consideration and promise to the father may well extend to the children: and he and Jones remembered the case of *Norris & Pine*; and that it was adjudged as aforesaid. But Scroggs said, he was then and still is of opinion contrary to that judgment. Dolben, Justice, concurred with him that the daughter might bring the action: Jones and Wylde *haesitabant*. But next day they also agreed to the opinion of the Chief Justice and Dolben; and so judgment was given for the plaintiff, for the son hath benefit by having of the wood, and the daughter hath lost her portion by this means. And now Jones said, he must confess he was never well satisfied with the judgment in *Norris*

& *Pine's case*; but being it was resolved, he was loth to give his opinion so suddenly against it. And *nota*, upon this judgment error was immediately brought; and Trin. 31 Car. II., it was affirmed in the Exchequer-Chamber.¹⁵

It may perhaps be worth while to append to these cases for purposes of comparison the definition of "valuable consideration" given in the Exchequer Chamber in *Currie v. Misa*, (1875) 44 L. J. Ex. 94—the modern *locus classicus*" on the subject:

"A valuable consideration, in the sense of the law, may consist either in some right, interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility, given, suffered, or undertaken by the other."

There are other matters which might be dwelt upon in the cases during the period under discussion—such as the relative fields of the actions of *debt* and *assumpsit* and the like—but they are, as a rule, of too technical a character to be of much profit to a modern lawyer. I must say, in conclusion, that I am most grateful to my historical friend for suggesting to me this task. I have found it very interesting. The period in question is probably not of so great interest to an historian as the earlier periods dealt with by such students as Maitland, Pollock and Holdsworth in this country. To a lawyer, however, it is of quite equal interest; as it is a time when legal ideas are beginning to emancipate themselves from legal forms, and, under the influence of such great intellects as Chief Justices Holt and Hale, are beginning to assume definite and logical form. Anyone who reads the cases set forth above, will I think, be struck with the *modern* way in which the legal questions are handled. I do not apologize for setting the cases out at length. I am more convinced every day that no one can really understand the English Common Law until he knows something about the English forms of action and their history, and that the first thing to be done in reading an old case is to find out exactly what the form of action is, and why that form was adopted.

FRANCIS R. Y. RADCLIFFE.

¹⁵ See Sir T. R. 302.

Notwithstanding that this is a decision of the Exchequer Chamber it is clearly no longer law in England. See *per* Wightman, Crompton and Blackburn, J.J., in *Tweedle v. Atkinson* (1861). 1 B. & S. 393. The modern rule is that no stranger to the consideration can take advantage of a contract, although made for his benefit.

THE EVOLUTION OF CHANCERY AND THE JUDICIAL MURDER OF SIR THOMAS MORE, ONE OF ITS GREATEST ADMINISTRATORS.

"The fame of to-day is infamy to-morrow;
The infamy of to-day is fame to-morrow."

The office of Chancellor had its origin in the reign of Edward the Confessor. After the Norman Conquest and the establishment of the Curia Regis, this official supervised the issue of Royal Charters and sealed the writs by which proceedings in the Court of the Chief Justiciar were instituted. He, also, was Secretary of the different departments of State, conducting the King's correspondence and occasionally acting as an itinerant Justice. At first the Chancellor held a subordinate position, only ranking sixth in order of the great Officers of State, coming after the Chief Justiciar, the Constable, the Marshal, the Seneschal and the Chamberlain. After the establishment of the three superior Courts of the King's Bench, the Common Pleas and the Exchequer, offshoots of the Curia Regis, and after the abolition of the office of the Chief Justiciar, the Chancellor became the standing legal adviser of the Council.

His equitable jurisdiction arose in manner following: It was early felt the Common Law Courts in many cases could give no redress, or no adequate redress, on account of their limited powers and formal rules of procedure and, consequently the Suitor, virtually without remedy, was compelled to appeal to the King, by petition for relief as the head and fountain of justice, who held in reserve the power to afford aid according to very right and good conscience. These petitions were from time to time referred to the Chancellor, the keeper of the King's conscience, and at length came to be presented to this official in the first instance, either to investigate and report upon to the King and Council for consideration, or, in ordinary cases, to mete out such justice as he might deem proper. It would seem fitting such questions should be referred to the King's Chaplain or one in Holy Orders, who, by his training in canon and ecclesiastical law, would be better versed in matters that savoured rather of ethics than of such as were interpreted by the strict letter of the law. Increase of business gradually led to a regular mode of procedure; also to the appointment of Masters in

Equity, to whom references were directed and by whom reports were made in collateral questions; and also to the appointment of a judicial officer, generally the chief of the Masters, called the Master of the Rolls. Finally the Chancellor acquired a status of rank and dignity, as exalted as that formerly employed by the Grand Justiciar, and one eagerly sought after by judicial aspirants. And thus gradually were laid the foundations upon which the modern system of the Court of Equity has gradually been built.

The range and variety of the Chancellor's duties were thus briefly summarized by Mentham, in the early part of the nineteenth Century,—“He is (1) A single Judge controlling in civil matters the several jurisdictions of the twelve great Judges. (2) A necessary member of the Cabinet, the chief and most constant adviser of the King in all matters of law. (3) The perpetual President of the highest of the two Houses of Legislature. (4) The absolute proprietor of a prodigious mass of ecclesiastical patronage. (5) The competitor of the Minister for almost the whole patronage of the law. (6) The keeper of the Great Seal; a transcendent, multifarious, and indefinable office. (7) The possessor of a multitude of heterogeneous scraps of power, too various to be enumerated.”

During the reign of Edward III., Chancery began to be regarded, not merely as a department of State, but as a Court. It was not till the end of the 15th Century that the Chancellor got a jurisdiction clearly distinct from that of the Council.

Under the Tudor dynasty a strong executive government was formed, by a reorganization of the Council, a new classification of its powers and a settlement by well defined limits of the jurisdictions of the different Courts. The Chancellor then became the Judge of the Court of Chancery.

In the earlier years of its existence, the Court of Chancery was looked upon with disfavour by the Common Law Courts. Its Chancellors, who were men for the most part in Holy Orders, and wanting in proper legal training, sought to magnify their office and made bold incursions in the regions of the settled principles and decisions of the Common Law Courts.

It had grown into a trite aphorism, that Equity acted by and upon the conscience. This was accepted in a double sense. In one sense it claimed to grant right and justice in

all cases brought under the consideration of the Court, according to the conscience of the Chancellor. It was this that gave point to Seldon's stinging criticism: "Equity is a roguish thing: for law we have a measure. Equity is according to the conscience of him who is Chancellor, and as that is larger or narrower, so is equity. It is all one as if they should make the standard for the measure we call a foot, 'a Chancellor's foot.' What an uncertain measure would this be? One Chancellor has a long foot; another a short foot, a third, an indifferent foot: It is the same thing in the Chancellor's conscience."

And to the like effect was the following stricture of Lord Camden: "The discretion of a Judge is the law of tyrants; it is always unknown; it is different in different men; it is casual, and depends upon constitution, temper and passion. In the best it is oftentimes caprice; in the worst it is very vice, folly and passion to which human nature is liable."

In another sense its exercise from the standpoint of equity was claimed to exert a salutary influence in reforming the morals of the defendant and in the purification of his conscience. It likewise claimed to preserve his conscience from the taint of pollution consequent upon the retention of benefits or advantages acquired by fraud, undue influence and double dealing with persons standing in fiduciary relationship: In other words, its carthartic process tended,

"To cleanse the stuff'd bosom of that perilous stuff,
Which weighs upon the heart."

In the early part of the seventeenth century, during the reign of James I., occurred the notable dispute between the Courts of Equity and Law, when Lord Ellesmere was Lord Chancellor, and Lord Coke, Chief Justice, both Judges of surpassing ability and unyielding disposition. The contest waxed so warm that indictments were preferred against the suitors, solicitors, counsel and a Master in Chancery, for having incurred a *praemunire*, by seeking to stay by injunction the execution of a judgment obtained in the Court of King's Bench, on the ground of fraud and perjury. It was a struggle, like that of the fabled Titans, which shook the judicial pillars of the State.

During the period of the Commonwealth an attempt was made to remedy the alleged abuses and defects of this Court.

In a debate in Parliament, in 1653, it was reported: "The Court of Chancery was called by some members the greatest grievance in the nation. Others said, that for dilatoriness, changeableness, and a faculty for bleeding the people in the purse vein, even to their utter perishing and undoing, that Court might compare with if not surpass any Court in the world. That it was confidently affirmed by knowing gentlemen of worth, that there were depending in that Court, 23,000 cases, some of which had been there depending five, some ten, some twenty, some thirty years and more; that there had been spent therein many thousand pounds to the ruin, nay utter undoing of many families. That what was ordered one day was countermanded the next, so, as in some causes, there had been 500 orders and more; so that some members did not stick to term the Chancery a mystery of wickedness, and a standing cheat, and that in short so many horrible things were affirmed of it, that those who were or had a mind to be advocates for it, had little to say on the behalf of it."

The organization of the Court as then existing was abolished and a bill introduced to reconstitute it. Parliament, however, was dissolved before the bill became law. Cromwell, in 1654, embodied many of its provisions in a set of Ordinances, which he directed the Commissioners to enforce. One of the rules was, that all causes should be heard and examined on the day on which they were set down. This, however, was found impracticable.

On reading what was said in the Commonwealth Parliament, in 1653, regarding proceedings in the Court of Chancery, who can say, the following description of this Court, by Dickens, in the famous cause of *Jarndyce v. Jarndyce*, in Bleak House, was overdrawn? The great novelist says: "The lawyers have twisted it into such a state of be-devilment that the original merits of the case have long disappeared from the face of the earth. It's about a will, and the trusts under a will—or it was, once. It's about nothing but costs, now. We are always appearing and disappearing, and swearing, and interrogating, and filing, and cross-filing, and arguing, and sealing, and motioning, and referring, and reporting, and revolving about the Lord Chancellor and all his satellites, and equitably waltzing ourselves off to dusty death—about costs. All through the deplorable case the parties to the suit must go down the middle and up again,

through such an infernal country dance of costs and fees and nonsense and corruption, as was never dreamed of in the wildest visions of a witch's Sabbath. Equity sends questions to law. Law sends questions back to equity. Law finds it can't do this. Equity finds it can't do that. And thus, through years and years, and lives and lives, everything goes on, constantly beginning over and over again, and nothing ever ends. And we can't get out of the suit on any terms, for we are made parties to it, and must be parties to it whether we like it or not."

Notwithstanding the many difficulties encountered in carrying the system into practical effect, yet by a succession of able chancellors, after a struggle for many centuries, the Court of Chancery won its way to the crowning triumphs of the passage of the Supreme Court Judicature Act of 1873 and amending Acts, whereby the distinction between Courts of Equity and Courts of Law was abolished and a full recognition of the usefulness and wisdom of its principles demonstrated. By this Act, the justice of its rules was strikingly illustrated by the general rule, that wherever there is any conflict or variance between the rules of equity and those of the common law with reference to the same matter, the rules of equity shall prevail. Its success in mitigating the rigour of the common law and in moulding its decrees to suit the exigencies of particular cases, where injustice had been done by strict adhesion to the unbending rules of the common law, contributed materially to its growth and constantly increasing popularity.

The system was perfected under the hands of some of the most learned and distinguished jurists that ever adorned a seat of justice—Ellesmere, Nottingham, called the father of Equity, Hardwicke, Eldon, Westbury and Selborne.

Although severely criticised, it has been the subject of emphatic laudation by some of the most famous jurists of the day.

Lord Ellesmere, in his treatise on Equity, thus extols its merits: "As the Chancellor is at this day the mouth, the ear, the eye, and the heart of the prince, so is the Court whereof he hath the most particular administration, the oracle of equity, the storehouse of the favour of justice, of the liberality royal, and of the right pretorial which openeth the way to right, giveth power and commission to the Judges, hath jurisdiction to correct the rigour of the law by the

judgment and discretion of equity and grace. It is the refuge of the poor and afflicted; it is the altar and sanctuary for such as against the might of rich men, and the countenance of great men cannot maintain the goodness of their cause."

Jessel, M.R., in *Re Hallett's Estate*, L. R. 13 C. D., at p. 710, says: "Equity is a progressive science. Its rules are not, like the rules of the common law, supposed to have been established from time immemorial. . . . In Equity they have been established from time to time—altered, improved and refined from time to time. . . . The doctrines are progressive, refined and improved; and if we want to know what the rules of Equity are, we must look of course, rather to the more modern than to the more ancient cases."

Lord Hardwicke, who held the Great Seal for over twenty years, did more than any of his predecessors to establish the system of Equity jurisprudence upon a sane and rational basis. It was said of him: "There is no Judge in the juridical annals of England, whose judicial character has received greater and more constant homage." Lord Kenyon said of him: "His knowledge of the law was most extraordinary, and he was a consummate master of the profession." Chancellor Kent is no less eulogistic in the testimony he bears to the ability of this great Lord Chancellor. "His decisions," he remarks, "at this day, and in our own Courts do undoubtedly carry with them a more commanding weight of authority than any other Judge."

It is said Cardinal Wolsey was the first Chancellor who regularly sat alone in a judicial capacity, in the Court of Chancery. He delivered judgments regardless of the maxims of the Common Law and without consulting the Master of the Rolls or the Common Law Judges. Notwithstanding his lack of training in the Municipal Law and his ignorance of the doctrines and practice of the Court of Chancery, yet from his consummate ability and grasp of equitable principles, his decrees were generally sustained on appeal and he won the reputation of having discharged his duties with fidelity and without the slightest intimation of bribery or corruption.

The following is the expressed opinion of the Cardinal Lord Chancellor Wolsey on the distinction between law and conscience: "The King ought of his royal dignity and prerogative to mitigate the rigour of the law where conscience has the most force; therefore, in his royal place of equal

justice he hath constituted a Chancellor, an officer to execute justice with clemency, where conscience is opposed to the rigour of the law. And therefore the Court of Chancery hath been heretofore commonly called the Court of conscience, because it hath jurisdiction to command the high ministers of the common law to spare execution and judgment, where conscience hath most effect." Holding such exalted views of the office he proceeded to exercise his jurisdiction over everything which presented itself to his view as matter of judicial enquiry. Business consequently increased to an enormous extent, notwithstanding his great industry and promptness of despatch. On his downfall he left five hundred cases undisposed of.

Down to the time of Cardinal Wolsey, the ecclesiastical Chancellors, with their fine spun theories and intricate questions of casuistry, had brought the Court into merited disrepute. From this time forward, however, being superseded for the most part by Chancellors trained to the profession of the Common Law and having regard for well established principles and respect for precedent, the Court of Chancery, with an occasional lapse, entered upon the developing and systematizing process of reform, which subsequently resulted in the amalgamation of Equity and Law by the Judicature Act of 1873 and Amending Acts.

In the 16th Century the title of "Lord Keeper" appears frequently in place of "Lord Chancellor." In 1562 it was enacted, 5 Eliz., "That the Lord Keeper had, and of right ought to have, the same and like place, authority pre-eminence, jurisdiction, commodities and advantages, as a Lord Chancellor." The chief difference between a Lord Keeper and a Lord Chancellor, was in fact, that the former was seldom made a peer, and was, therefore, not a member of, though he presided over, the House of Lords.

The reason why the Court of Chancery acquired such an unsavory reputation, in the earlier years of its history, and at different times during its subsequent career, is not far to seek. Down to the appointment of Sir Thomas More, all of the Chancellors, with scarcely an exception, were men in Holy Orders. They were the appointees of the Sovereign and held office only during his pleasure. For the most part, supple minions of the Crown, they adapted their consciences, which were often of a very elastic nature, to the will and

bent of the Sovereign. This was especially so under the rule of the Princes of the House of Tudor and Stuart.

Cardinal Wolsey, who had a most equivocal conscience, was succeeded by Sir Thomas More, an upright and thoroughly competent Judge. More was succeeded by Sir Thomas Audley, one of the most despicable Chancellors that ever held the Great Seal.

Lord Campbell, in contrasting More and Audley, says: "There was a striking contrast, in almost all respects, between these two individuals—the successor of the man so distinguished for genius, learning, patriotism and integrity, having only commonplace abilities, sufficient with cunning and shrewdness, to raise their possessor in the world—having no acquired knowledge beyond what was professional and official—having first recommended himself to promotion by defending, in the House of Commons, the abuses of prerogative—and for the sake of remaining in office, being ever willing to submit to any degradation, and to participate in the commission of any crime. He held the Great Seal for a period of above twelve years, during which, to please the humors of his capricious and tyrannical master, he sanctioned the divorce of three Queens—the execution of two of them on the scaffold—the judicial murder of Sir Thomas More, Bishop Fisher, and many others, who, animated by their example, preferred death to infamy."

What was gained under the chancellorship of Sir Thomas More, was lost under that of Audley.

Queen Mary, of course, would not commit the keeping of her conscience to any other than an ecclesiastic, Sir Nicholas Heath. Without training in jurisprudence he got through his judicial business in a most unsatisfactory manner.

Queen Elizabeth was fortunate in the selection of her first Chancellor, Sir Nicholas Bacon, who held the Seal for twenty years.

The appointment of Christopher Hatton, as Lord Chancellor, by Elizabeth, reflected little credit upon her judgment; but from the letters which passed between them, the Virgin Queen, it seems, had fallen deeply in love with the gay Cavalier, uneducated as he was, and who had never been called to the Bar, but distinguished for his great beauty of person, and his skill in dancing. He proved a most incapable Chancellor. When he took his seat in the Court of Chancery, it is said, he was received with cold and silent disdain. So

once more what was gained by Nicholas Bacon was lost by the incompetency of the dancing Chancellor.

Seven years before her death, the Virgin Queen, when affairs of the heart ceased much to influence her, redeemed to a certain extent the lapse of judgment exhibited in the appointment of Hatton, by delivering the Great Seal to Sir Thomas Egerton, Lord Ellesmere, a thoroughly able and competent Judge. He held the Seal for a period of twenty-one years, under Elizabeth and James I. until he resigned it in 1617.

On July 10th, 1621, Bishop John Williams, the last ecclesiastical Chancellor in the history of the Court, received the Great Seal from the hands of James I. Owing to his inexperience and ignorance he was looked upon with merited contempt by the practitioners who appeared before him. On the 25th of October, 1625, he surrendered the Seal to Charles I. Bishop as he was, he made a vast number of orders privately on petitions, for the sake of the fees, which amounted to £3,000 per year.

At this time, the proceedings in Chancery were not reported. None of the decisions have been preserved. Nor was precedent held binding as in other Courts. Each ecclesiastical Chancellor regarded himself as bound only by his own conception of right. Under such a system, reform and efficiency were necessarily tardy. No substantial progress was effected until ecclesiastical Chancellors were discarded, and laymen bred to the law and thoroughly skilled in the practice and principles of jurisprudence, appointed in their stead.

On the 25th day of October, 1529, after the downfall of Wolsey, Henry VIII., impressed with the genius, integrity and learning of Sir Thomas More, and with a general chorus of approval on the part of the nation, delivered the Great Seal to him, and constituted the celebrated author of *Utopia* Lord High Chancellor of England.

In the long list of Lord Chancellors there is none, whose sad fate elicited more regret than that of Sir Thomas More, and none who won greater distinction by the despatch, marked ability and stern impartiality with which he discharged the duties of this great office. The son of Sir John More, an eminent Judge of the Court of the King's Bench; a page in the family of Cardinal Morton, Archbishop of

Canterbury and Lord Chancellor under Henry VII.; an undergraduate of Oxford; a student of Lincoln's Inn, where were taught the more profound and obtruse branches of legal science; a reader for three years at Furnival's Inn; and a leading advocate in Westminster Hall, More was in every respect, from his social advantages, training, education and legal acquirements, admirably fitted to discharge the important duties of the great office to which he was called as Lord Chancellor by Henry VIII.

From his profound knowledge of the leading principles of the Common Law, Sir Thomas was enabled to shape and mould the decrees of his Court into proper form and lay down fixed rules and certain forms of procedure for guidance upon well defined principles. When he accepted the Seals of office, he found 500 cases undisposed of, a legacy from the great Cardinal. He soon cleared off the arrears, and forthwith proceeded to remedy several abuses, that from time to time had insidiously crept into the practice of the Court; notably extortionate fees on the probate of wills; excessive demands for mortuaries, and preventing clerical persons from engaging in trade. A loose system had, likewise, obtained in granting a writ of subpœna on payment of fees without any examination as to whether there was any reasonable or probable cause for setting the machinery of the Court in motion and involving parties in the expense of a Chancery suit. The new Chancellor made an order that: "No subpœna should issue till a bill had been filed, signed by the Attorney; and he himself having perused it, had granted a fiat for the commencement of the suit." He carefully examined the petitions of all who came before him, giving redress according to law and good conscience. It was said of him: "The poorer and the meaner the suppliant was, the more affably he would speak unto him, the more heartily he would hearken to his cause, and with speedy trial, despatch him." As an instance of his unbending impartiality it is said, his son-in-law, a practitioner in the Court, merrily chided him in the manner following: "When Cardinal Wolsey was Lord Chancellor, not only divers of his Privy Chamber, but such also as were his doorkeepers, got great gains by him; and sith I have married one of your daughters, I might of reason look for some commodity; but you are so ready to do for every poor man, and keep no doors shut, that I can find no gains at all, which is to me a great discouragement; whereas else,

some for friendship, some for profit, and some for kindred would gladly use my furtherance to bring them to your presence; and now, if I should take anything of them, I should do them great wrong, because they may daily do as much for themselves; which thing, though it is in you sir, very commendable, yet to me I find it nothing profitable." To whom the incorruptible Judge replied: "But this one thing I assure thee, on my faith, that if the parties will at my hands call for justice and equity, then, although it were my father, whom I reverence dearly that stood on the one side, and the devil, whom I hate extremely, were on the other side, his cause being just, the devil of me should have his right."

He advocated a course of procedure by which law and equity might be beneficially administered by the same tribunal, seeking to induce the common law Judges to relax the rigour of their rules with the view to meet the justice of particular cases, thus anticipating the Judicature Act of 1873 and Amending Acts.

Instead of referring everything to a Master, it is said of him, he used to examine all matters that came before him, like an arbitrator; and he patiently worked them out himself to a final decree, which he drew and signed.

More, as Lord Chancellor, had not only high judicial duties to discharge, but owing to his position his political functions were no less onerous and important. Shortly after he was appointed Lord Chancellor the King consulted him on the question of the divorce. More frankly told him he was opposed to his design. The King, however, assured him he was quite free to hold his own opinion in this matter. When, after the lapse of some time, he found the King, owing to his intense and imperious will, was bound to break through every restraint and marry Anne Boleyn, More, as the sworn keeper of his conscience, petitioned him to be allowed to resign the Great Seal. The King was most reluctant to part with such an able and efficient servant and strongly urged him to suppress his conscientious scruples. This, the Chancellor, as a matter of conscience and as his legal adviser, could not do, and insisted upon resigning the Seal. On the 10th of May, 1532, his resignation was accepted, having held the position for only two and a half years. He left office a poor man with a large family to support. The Clergy in Convocation, owing to his necessitous condition, voted him a present of £5,000. This he absolutely re-

fused to accept. His whole income, after resigning office, amounted to only £100 per year.

More refused the invitation to attend the coronation of Anne Boleyn. From this hour his fate was sealed. Henceforth he became the object of the deadly hate of the Queen. In November, 1534, the Act of Supremacy was passed. This was followed by another, declaring its denial to be an act of treason. More was sent for and ordered to take the oath. He offered to swear to uphold the succession of the Crown as settled by Parliament, but steadily refused to take the oath acknowledging "the King as the only supreme head in earth of the Church of England," as being contrary to his conscientious convictions. He was then committed to the Tower and after close confinement for more than a year was brought before a special Commission with a packed jury. By means of an act of perjury, on the part of a high official, a verdict of "guilty" was found. On the 7th of July, 1535, he was executed on Tower Hill; his four quarters set over four gates of the City, his head stuck on a pole and placed on London Bridge. What little property he left was confiscated by the inhuman tyrant, who, in his career of shame, exhibited a catalogue of vices enumerated by Hume as "violence, cruelty, profusion, obstinancy, rapacity, arrogance, bigotry, presumption and caprice"—a catalogue scarcely less damnatory than such as are contained in the list of the seven deadly sins.

Lord High Chancellor Campbell thus vindicates the character of Sir Thomas More: "Considering the splendour of his talents, the greatness of his acquirements, and the innocence of his life, we must still regard his murder as the blackest crime that ever has been perpetrated in England under the forms of law. . . . His character, both in public and in private life, comes as near to perfection as our nature will permit. . . . Can we censure him for submitting to loss of office, imprisonment, and death, rather than make such a declaration? He implicitly yielded to the law regulating the succession to the Crown; and he offered no active opposition to any other law; only requiring that, on matters of opinion, he might be permitted to remain silent. The English Reformation was a glorious event, for which we never can be sufficiently grateful to Divine Providence; but I own I feel little respect for those by whose instrumen-

talities it was first brought about; men generally swayed by their own worldly interests, and willing to sanction the worst passions of the tyrant to whom they looked for advancement. With all my Protestant zeal, I must feel a higher reverence for Sir Thomas More than for Thomas Cromwell or for Cranmer."

The Hon. Sydney Lee writes to the like effect: "More's piteous fate startled the world. The Emperor, Charles V., declared he would have rather lost his best city than such a counsellor. In all countries poets likened him to the greatest heroes of antiquity, to Socrates, Seneca, Aristides and Cato. . . . Surveying More from another side we find ourselves in the presence of one endowed with the finest enlightenment of the Renaissance, a man whose outlook on life was in advance of his generation; possessed too of such quickness of wit, such imaginative activity, such sureness of intellectual insight, that he could lay bare with pen all the defects, all the abuses, which worn-out conventions and lifeless traditions had imposed on the free and beneficent development of human endeavour and human society."

In the general opinion of Europe the foremost Englishman of the time was Sir Thomas More,"—is the testimony of the historian, John Richard Green.

James Anthony Froude, who has been said to hold a brief for Henry, thus comments on the death of the great Lord Chancellor: "This was the execution of Sir Thomas More, an act which was sounded out into the far corners of the earth, and was the world's wonder as well for the circumstances under which it was perpetrated, as for the preternatural composure with which it was borne. Something of his calmness may have been due to his natural temperament, something to an unaffected weariness of a world which in his eyes was plunging into the ruin of the latter days. But those fair hues of sunny cheerfulness caught their colour from the simplicity of his faith; and never was there a Christian's victory over death more grandly evidenced than in that last scene lighted with its lambent humour."

Thus passed one of the greatest and most upright Lord Chancellors that ever graced the marble chair; one whose heart was full of tender affection for all brought within the sphere of his activities; whose life was pure and whose hands were clean; one who counted life not dear when weighed

against the conscientious discharge of duty as the sworn adviser and keeper of his Sovereign's conscience; and one who was so clear in his great office that his virtues pleaded like angels trumpet-tongued against the deep damnation of his taking off.

St. John, N. B.

SILAS ALWARD.

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THE JUDICIAL COMMITTEE.

McHUGH v. THE UNION BANK.

The Bank Act permits banks to stipulate for seven per cent. interest. Suppose they stipulate for eight, can they recover seven, or only five, or nothing? I should have said seven; and, for second choice, nothing; the Judicial Committee gave the bank five.

The controlling section of the Bank Act is as follows:—

“The bank may stipulate for, take, reserve or exact any rate of interest or discount, not exceeding seven per centum per annum, and may receive and take in advance, any such rate, but no higher rate of interest shall be recoverable by the bank.”

Referring to this clause, their Lordships said:—

“Their Lordships are of opinion that the express provisions of the first portion of this clause rendered it *ultra vires* on the part of the bank to insert, in the chattel mortgage of 28th May 1907, the stipulation that interest should be payable at the rate of eight per cent., and that, therefore, that stipulation is inoperative. They are of opinion, therefore, that the contention on behalf of the plaintiff in this respect is right; and that the interest under that mortgage must be calculated at the rate of five per cent. per annum.”

No further reason is offered, and there is no discussion of an argument which appears to render a contrary view inevitable. Shortly it is this: that the language under construction is part of the Revised Statutes of 1906 (ch. 29, sec. 91); that, prior to the revision, the construction of the same sentence, in the previous Bank Act, entitled the bank

to seven per cent.; that that construction of the previous Act was rendered necessary by the presence in the same Act of another clause in which the same language (practically) was used; that this other clause was omitted, from the Revised Statutes, merely because (by reason of another statutory change) it had become unnecessary; and that, therefore, the construction of the words under consideration must necessarily be the same after revision as it was before. The following are the two clauses as they appeared in the earlier Bank Act:—

“80. The bank *shall not be liable to incur any penalty or forfeiture for usury*, and may stipulate for, take, reserve or exact any rate of interest or discount not exceeding seven per cent. per annum, and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank; *and the bank may allow any rate of interest whatever upon money deposited with it.*”

(Note that the italicized words do not appear in the Revised Statutes).

“81. No promissory note, bill of exchange or other negotiable security, discounted by, or indorsed, or otherwise assigned to the bank, shall be held to be void, usurious or tainted by usury, as regards such bank, or any maker, drawer, acceptor, indorser, or indorsee thereof, or other party thereto, or *bona fide* holder thereof, nor shall any party thereto be subject to any penalty or forfeiture by reason of any rate of interest taken, stipulated or received by such bank, on or with respect to such promissory note, bill of exchange, or other negotiable security, or paid or allowed by any party thereto to another in compensation for, or in consideration of the rate of interest taken, or to be taken, thereon by such bank; but no party thereto, other than the bank, shall be entitled to recover or liable to pay more than the lawful rate of interest in the Province where the suit is brought, *nor shall the bank be entitled to recover a higher rate than seven per cent. per annum*; and no innocent holder of, or party to, any promissory note, bill of exchange or other negotiable security, shall in any case be deprived of any remedy against any party thereto, or liable to any penalty or forfeiture by reason of any usury or offence against the laws of any such Province respecting interest, committed in respect of such note, bill or negotiable security, without the complicity, or consent, of such innocent holder or party.”

We have then, in sec. 80 of this prior statute, the exact language which formed the subject of discussion before the Judicial Committee. We have, too, in sec. 81, language of precisely similar import. And if, therefore, we can tell by collocation of these two clauses what was meant prior to the revision, we shall know what it was afterwards—unless the omission of sec. 81 from the Revised Statutes had the effect of giving, to the language under discussion, a meaning opposed to that which it had before.

There is no room for difference of opinion as to sec. 81. It relates to bills and notes which (like the mortgage in question) reserved more than the legal rate—more than seven per cent. in the case of a bank, and more than six per cent. in favour of others; it declares that these instruments when discounted or assigned to a bank, shall *not* be void; and that “no party thereto, other than the bank, shall be entitled to recover or liable to pay more than the lawful rate of interest in the Province where the suit is brought; *nor shall the bank be entitled to recover a higher rate than seven per cent. per annum.*”

Very clearly the effect of this clause is that persons other than a bank, suing upon bills or notes which reserve more than legal interest, may recover six per cent.; and that a bank may recover seven per cent. And if that was the meaning of sec. 81, it was, necessarily, the meaning also of sec. 80.

It is perfectly clear, therefore, that if the present action had been brought before the revision of the statutes, the bank would have been entitled to recover seven per cent.—that that was the effect of the above quoted sec. 80. And the only question that remains is whether precisely the same language in the Revised Statutes can be given a contrary interpretation. To that question no lawyer in Canada would suggest an affirmative reply.

If it be said that sec. 80 in the earlier Act was given the meaning which I have ascribed to it only because of the presence of sec. 81, the sufficient reply is that sec. 81 did not change the meaning of sec. 80, but proved, merely, the sense in which Parliament had used the words; and that the meaning, thus proved, must be held to be that which was intended by continuation, in the Revised Statutes, of precisely the same language.

The omission, from the Revised Statutes, of section 81 had no special significance. The reason for it is clear. Prior to the date of the passage of the earlier Bank Act, the statute relating to interest (R. S. C. 1886, ch. 127, sec. 11), had declared void all bills, notes, etc., whereupon a greater interest than six per cent. was reserved; and had fixed a penalty for taking a higher rate. It was necessary, therefore, in legislation with reference to banks, to exempt their transactions from the effect of the interest statute. And it was for that reason that the first few words of sec. 80, and the whole of sec. 81, were inserted in the earlier Bank Act. Before the revision took place, however, the usury clauses of the interest statute had been repealed; the introductory words of 80, and the whole of 81, had for that reason become unnecessary; and they were accordingly omitted from the Revised Statutes.

This conclusion is no mere inference, nor does it depend upon a process of reasoning. It is placed beyond dispute by a memorandum which appears in the Revised Statutes themselves (vol. 4, p. 19), declaring that sec. 81 is "unnecessary in view of 53 Vict. ch. 34, sec. 2, and recommended for repeal." This 53 Vict. ch. 34, sec. 2, is the clause which repealed the usury clause of the Interest Act.

We may take it then as indisputable that the words "but no higher rate shall be recoverable by the bank," must have the same meaning in the Bank Act of the Revised Statutes as they had in sec. 80 of the previous Bank Act from which they were taken. It is indisputable, also, that the meaning of these words in section 80 must be the same as practically the same words in sec. 81, by which it was accompanied. And it is indisputable that under sec. 81, banks would be entitled to seven per cent.

That is the argument. It appears to be clear, simple, and conclusive. It was placed fully before their Lordships. They make no comment upon it. They do not even refer to it.

Sometimes, I suppose our Supreme Court goes astray. But, at least, its Judges always give the defeated suitor the satisfaction of a little explanation.

GENERAL SUMMARY.

In the preceding numbers of this journal, criticism has been made of six of the decisions of the Judicial Committee.

In one case a surprising limitation of provincial legislative authority was declared in the absence of any pleading or evidence sufficient for the discussion of the point; in the absence of any objection by the party in whose favour the decision was given; in the absence of any effective argument; and without attention to considerations, which obviously necessitated a contrary holding (*Rex v. Royal Bank*).

In the second case, their Lordships declared that counsel had not contested a certain point; although the point had been most elaborately argued; and although, even if not argued, the law was clearly contrary to the decision (*City of Winnipeg v. Winnipeg Street Railway Company*).

In the third case, their Lordships held that the construction of language in a consolidated statute was the exact opposite of that which was its meaning prior to consolidation; and gave not a hint of the reason for so holding. (*McHugh v. Union Bank*).

In the fourth case, their Lordships held that purchases by one partner without the consent of his fellows, with moneys wrongly withdrawn from the firm (and, therefore, the firm's), were made on account of the firm; although the fact that they were not so made was admitted; although they could not have been so made (because outside the scope of the partnership); and although some of them resulted in losses (*Kelly v. Kelly*).

In the fifth case, the two reasons given by their Lordships for their decision in a thirteen million-dollar case were based upon clearest misapprehension (*Rex v. Grand Trunk Pac. Ry. Co.*).

In the sixth case, counsel for appellant practically abandoned a certain point; counsel for respondent was told that he need not pursue his answer to it; and their Lordships, in their reasons for judgment, proceeded upon the ground that the appellant was right. Their Lordships also proceeded upon an interpretation of the word "bridges" in the statute from which a company derived power to build bridges; but

they referred to the wrong statute; and, in the right statute, the word "bridges" did not appear. Finally, from power given to a company to do a certain sort of work, their Lordships inferred the existence of a contract to do particular work of that class (*Re v. Alberta Ry. Co.*)

I do not say that all the decisions of the Committee are as flagrantly and indisputably wrong as these six. Some of their Lordships are able men, and, considering the handicaps under which they labour, they do surprisingly good work. But I do mean that these six decisions are all of very recent date (all within two years); that anybody can easily add to the list; and that the record is a complete reply to those who tell us that our own Courts cannot be trusted, that, in order to be secure, we must have the right of taking our cases to London, that Canadian lawyers cannot satisfactorily dispose of Canadian law-suits.

Were I the first to feel dissatisfaction with the operations of the Committee, I should remain silent; but when I know that I am but reiterating what has been many times said before, I feel that I need not hesitate to express my views. For example, the present Lord Chancellor (prior to his accession to that office) during the debate on the Australian Commonwealth Bill in 1900, said:—

"If there are two tribunals sitting for the despatch of the same business, the one is starved in order to keep up the other, and the judicial strength inevitably gravitates toward the House of Lords; and until you make the colonials feel that the tribunal to which they come, is the same as that to which you yourselves appeal, you will never get their confidence.

"The result has been that though the Privy Council is considered good enough for the colonies, it is not allowed in Great Britain and Ireland to be good enough for us."¹

In a pamphlet published in 1905, Mr. Haldane, said:—

"Again the state of the Supreme Court of Appeal is unsatisfactory. Just now it is split into the House of Lords, which acts for England, Scotland and Ireland, and the Judicial Committee . . . which acts for the rest of the King's dominions. The neglect of statesmen has led to the second being starved for the sake of the first. It is no part of the business of the Colonial Office to look after it, and there are murmurs, loud and long, every now and then, over the

¹ *Commonwealth of Aus. Constitution Bill*, pp. 34, 5.

state of what, after all, is an important link between the colonies and the mother country.”²

Mr. Deakin, Premier of Australia, at the Colonial Conference of 1907, said:—

“Since those events the Government and, I think, the great majority of the Parliament and people of Australia have not altered their attitude upon this question. They are no more contented with the present condition of appeal cases than they were in 1900 or 1901. Nor are their sentiments likely to alter after the judgment given lately in an Australian case, in which two matters of vital importance came before the consideration of the Judicial Committee.”

The King’s speech to the British Parliament in 1908, contained the following:—

“Much needed provision has been made for affording judicial assistance to the Judicial Committee of the Privy Council and to the Court of Appeal in England.”

Writing in 1909, Sir Frederick Pollock said that “it is really not plausible (*sic*) at this day to assert that the working of the Judicial Committee gives general satisfaction.”

As I write, comes the London *Times* of 28th May containing, editorially, the following: “There have been times in which the Judicial Committee did not rise to the height of its opportunities. A Court of three or four members reviewed, and perhaps overruled, the decisions of half a dozen colonial Judges. In such an event, the parties who were unsuccessful in the Privy Council were not satisfied; the Judges who were reversed were apt to feel aggrieved if, as often at one time happened, the Court decided the bare minimum necessary for affirming or reversing, laying hold of a subsidiary issue, determining it, but shirking the responsibility of dealing with the question mainly argued and chiefly interesting in the Courts below.”

In its issue of the previous day, a writer in the *Times* said: “Complaint has too often been made of late that important appeals have been disposed of by only three Judges, whereas the original tribunals in Canada or Australia were composed of double that number. Two appeals in the present lists are set down to be re-argued—an expensive result which might perhaps have been avoided if the appellate Judges had been more numerous.”

² A. F. Pollard: *The Br. Emp.*, p. 771.

These protests may be added: the elaborated criticisms of Mr. W. S. Deacon in 31 *Canadian Law Times* (1911), pp. 6-10, 123-8; and of Mr. Justice Clark in *Australian Constitutional Law*, pp. 335-57. A short account of Australian objection to appeals to London is given in my book *The Kingdom of Canada*, pp. 226-36.

The handicaps under which the Committee labours, and which necessarily produce the general dissatisfaction appear to be the following:—

(1) It is a final Court of Appeal; and has, therefore, no dread of higher judicial criticism.

(2) It sits thousands of miles away from the countries appealed from; and is, therefore, free from the professional criticism which, in England, attends every doubtful decision of the House of Lords.

(3) Dissenting judgments not being permitted, it has no fear of criticism from its own members.

(4) It suffers from a conviction of its own superiority—a conviction due (a) to the ruling character of the race to which its members belong, and (b) to the fact that, by sending our cases to it, we appear to acknowledge our incapacity.

(5) The Committee has, frequently, no familiarity with local circumstances and practices, without which intelligent decision is impossible.

(6) The Committee has the assistance either of English barristers, who themselves lack the necessary familiarity; or of Canadian barristers, who speak from one standpoint and are listened to from another.

When the Australians, in 1871, were proposing the abolition of appeals to the Committee, their Lordships defended their jurisdiction in this way:—

“It is impossible to overlook the fact that this jurisdiction is part of Her Majesty’s prerogative, and which has been exercised for the benefit of the colonies since the date of their settlement. It is still a powerful link between the colonies and the Crown of Great Britain, and secures to every subject throughout the Empire the right to redress from the throne. It provides a remedy in many cases not falling within the jurisdiction of the ordinary Courts of justice. It removes causes from the influence of local prepossession. It affords the means of maintaining the uniformity of the laws of England and her colonies, which derive a great body of their laws from Great Britain; and enables them, if they

think fit, to obtain a decision in the last resort from the highest judicial authority, composed of men of the greatest legal capacity existing in the metropolis."

1. Their Lordships are well aware that *no* subject has "the right of redress from the throne;" that the Sovereign never hears or reads a word about any of the cases; and that the appeal is not (except in name) to the King, but to certain gentlemen nominated (for the most part) by the British Government. Their Lordships themselves say that the decisions are those "of men of the greatest legal capacity existing in the metropolis." And is it not a mockery to speak of the right of "*every* subject . . . to redress from the throne," when the enormous cost renders appeals almost prohibitory.

2. Their Lordships are well aware that their jurisdiction is *not* (except in name) part of the Sovereign's prerogative. From the actual exercise of that, and nearly every other part of the old prerogative, almost the only person excluded is the reigning Sovereign.

3. "It removes causes from the influence of local prepossession!" And it places them, unfortunately, under the influence of British prepossession. It brings them for adjudication to men utterly unfamiliar with the system of which they form a part—to men who see little of the back-ground and perspective which is necessary to a proper realization of the point in controversy. The advantages of local prepossession were not sufficient to induce the British people to accept Mr. Chamberlain's proposal of an "Imperial Court of Appeal" for both British and colonial cases—a Court in which *colonial* Judges would sit in appeal from *British* Judges. There is not a lawyer in the British Isles who would not laugh at the suggestion.

4. "It is still a powerful link between the colonies and the Crown!" That would be true if the appeal were to the Crown. It is not. It is an appeal (very largely) to British Judges. It is merely a part of our former colonial subordination.

5. "Uniformity of laws!" If uniformity be a desideratum, we must commence not with the Courts, but with the Legislatures. In Canada we have nine of these making diverse laws; in Australia there are six; and in the United Kingdom although there is but one Parliament (thus far) there are frequently diverse laws. Uniformity! In the de-

bate on the Australian Commonwealth Bill, Mr. Asquith gave their Lordships credit for acting on precisely the contrary principle, saying that it had been the special care of their Lordships to maintain "most jealously and scrupulously, the integrity of the different system of laws," and they "have prevented, as far as they can, any filtration of ideas from a foreign source of law which might permeate and corrupt another system. . . . You cannot have a uniform interpretation of diverse systems of law."

None of the reasons given by their Lordships for the perpetuation of their jurisdiction has the least validity. And if it be said that a good reason exists in the insufficiency of our own Supreme Court I reply:—

(1) The Court, as now constituted, is a good Court. It is able, courteous and painstaking. It never falls into such gross errors as not infrequently characterise the judgments of the Judicial Committee.

(2) The Court ought to be strengthened. We ought to have three more Judges—two skilled in English law, and one in the French law.

(3) If the Court were a final Court of Appeal:—

(a) Men who decline appointment would accept it.

(b) Governments would be more careful in their selections.

I am aware that, in the past, Government offers of appointment have frequently been met with refusal. Did ever a United States lawyer decline elevation to his Supreme Court?

In Canada we have men capable of building and managing railways on colossal scales; men capable of conducting immense financial undertakings; men capable of directing educational institutions of the highest merit; men capable of originating and making successful vast business enterprises; men capable as mechanics, inventors, dentists, doctors, statesmen. ARE THE LAWYERS THE ONLY IMBECILES?

JOHN S. EWART.

EQUITY AND THE COMMON LAW.

That equitable principles must influence the process of the common law is indisputable, and this doctrine has so important a bearing upon the formation, expansion, and interpretation of law and in the administration of justice as to justify an endeavour to examine its position in regard to the growth of the common law in England.

The extent to which the influence of equity should operate upon the law is a difficult question, since equity, as its name implies, connotes a discretionary power which is necessarily a variable quantity.

Without discussing in any detail the various meanings which have from time to time been attached to the word "equity," suffice it to say that for the present purpose it must be taken in its broadest and true significance, to denote a principle, or set of principles, and not a specific department of law.

In order fully to appreciate the doctrine of equity, it may be well at the outset of the present inquiry to recall the origin of the term and to observe the kind of influence which it has been employed to express. Without some general impression of the origin and history of equity jurisdiction, it will be difficult to ascertain the precise nature and limits of its influence in our judicial system.

The Latin *Aequitas*, which, according to Sir Henry Maine, is the equivalent of the Greek word *zōluch*, carries with it a sense of levelling, and it is this levelling tendency that, as he has explained, identifies *Aequitas* with the *Ius Gentium* of the Roman lawyers, and with the *Ius Naturale* of the Stoic philosophers.

Perhaps the most explicit interpretation of the term "equity" is "reasonableness," or "reason;"¹ and in this sense equity has sometimes been described as a standard or ideal with which the law ought to conform, and which therefore should associate itself, not only with the framing and formation of law, but also with the modification of existing law where this is rendered necessary by the general progress of human affairs. The meaning of reasonableness we get in the

¹ Sir F. Pollock, in his note to Maine's *Ancient Law*, at p. 77 says: "This conception, when embodied for practical use as an appeal to the common sense of rightminded men, is closely akin to that of natural justice."

Middle-English "epicheia," which is synonymous with equity,² and which is obviously borrowed from the Greek *dikaion* employed by Aristotle to distinguish equity from law, *epieiklia*.

John Gerson, who was the leading exponent of legal doctrines in the middle ages, describes the influence of *epieiklia* in these words: "*aequitas quam nominat philosophus epicheiam praeponderat iuris rigori. Est autem aequitas iustitia pensatis omnibus circumstanciis particularibus dulcore misericordiae temperata. Hoc intellexit qui dixit. 'Ipsae autem leges cupiunt ut iure regantur.' Et sapiens. 'Noli esse iustus nimis alioquin summa iustitia summa iniustitia fit.'*"⁴

It is in this same sense that Cicero spoke of *Aequitas* as the spirit of the law and of *Ius* as the letter of the law.⁵ Also Glanville, writing at the end of the twelfth century, alludes to the *virga aequitatis* in describing the spirit in which Henry II. administered justice:

"*Ut utroque tempora pacis et belli gloriosus Rex noster ita feliciter transigat, ut infrenatorum et indomitum dextra fortitudinis elidendo superbiam et humilium et mansuetorum aequitatis virga moderando institiam tam in hostibus debellandis semper victoriosus existat quam in subditis tractandis aequalis iugiter appareat.*"⁶

It is unnecessary to multiply instances in illustration of the spirit of equity, but the distinction between "equity" or "natural justice," or "reasonableness" on the one hand, and the common law on the other, is so clearly expressed in a modern French definition that we cannot refrain from quoting it:—

"*On entend par droit naturel le droit idéal, celui qui est le plus conforme aux idées de justice, et dont la législature doit s'efforcer de se rapprocher le plus possible, dans la confection des lois. On entend par droit positif la loi qui est en vigueur à un moment donné sur le territoire d'un Etat. Lorsqu'une loi est mal faite, lorsqu'elle blesse les idées de justice et d'équité, on dit qu'elle est contraire au droit naturel.*"⁷

It is obvious, then, that the broad principle underlying the doctrine of equity in its widest sense, is, and always has been,

² Thus John Fisher has spoken of "epicheia whiche is proprely the mynde of the lawe." John Fisher, Penit. VII. Ps.

³ Gerson, "Regulae Morales" (Op. ii. F.).

⁴ "Galba autem adludens varie et copiose multas similitudines adferre multaue pro aequitate contra ius dicere," Cicero de Oratione i. 56 E. 240.

⁵ Glanville, Prolog. iii.

⁷ "La Synthèse du Droit," par Boitel et Foignet.

one of reasonableness and natural justice in the protecting of rights and prevention of wrongs, and it is not unnatural that such a principle has been closely associated with the growth of the law; indeed it would be strange if it were otherwise. With this general outline of the nature of equity, short and imperfect as it necessarily is, we may now pass to consider the mode and extent of its application in our own legal system.

The common law of England may be said to have taken shape towards the close of the twelfth century, when a record of decisions of the Courts was first kept. Prior to that time the law was naturally somewhat crude. There were no definite precedents to be followed, and there were no established principles for the guidance of the Court. Yet in the administration of this vague justice it may well be supposed that an equitable spirit granted relief in cases of particular hardship, though it is difficult to trace any clear acceptance of the principles of equity before the reign of Henry II. From that time onward records of judicial proceedings were collected, and our common law consists of the great mass of these compilations, having been gradually built up during centuries from decisions upon cases for which no previous provision was made by the existing law. They were decided, of course, as they had to be, according to a discretionary view of what was right and just. Each new decision then became a precedent to be followed in settlement of subsequent questions of a similar nature, and it is these precedents which form the common law of England as we know it. It is the strict and binding force of these precedents which has sometimes been described as the rigour of the law. Whether or not in particular cases where the application of the law created hardship, equity was at this early period (twelfth century) permitted to vary established precedents in the interests of justice there is no absolute certainty, though in the words of Lord Lyttleton "as in those days there was no distinct Court of Equity, the Judges of the King's Court had probably a power of mitigating in some cases the rigour of the law."¹ An instance of such equitable relief is given by Glanville with reference to the early law of succession: "*Super hoc ultimo casu in Curia Domini Regis de consilio Curiae ita ex aequitate consideratum est . . .*"²

The rigidity of the common law was exemplified in the strict formality which had to be observed by those who

¹ Litt. Hist. of Life of Henry II., vol. 3, 8th ed., p. 315.

² Glanville, Liber VII., p. 48.

sought redress thereunder. Prior to the Statute of Westminster II. (1285) there existed separate writs of *ael, besael,* and *cosinage*, to be employed in actions for a declaration of title, and differing only according as the title depended upon the seisin of a grandfather or a greatgrandfather and so on. Similarly there were separate writs in actions for trespass of pigs and trespass of cattle respectively. These are but isolated instances of the excessive formality required for a long time in the early common law, and if the form was not strictly complied with, the law would not interfere to assist a litigant, even in the redress of an intolerable hardship.

Legislative enactments have, of course, played a prominent part in the growth of every legal system, and have frequently assisted the righteous claims of those who otherwise would have been without a remedy. But in all the legislation there is necessarily a certain infirmity, inasmuch as laws must in every case be conceived in general terms. It is not possible that the letter of the law can be so expressed as to provide for the infinite variety of circumstances which may qualify particular cases. The influence of equity must therefore have a twofold application in the administration of statute law; in the first place it should influence the general terms of the law in the light of reason and justice; and secondly, it should assist in the interpretation of the law in accordance with the particular demands of individual circumstances. But beyond this power of assistance and interpretation in the growth and expansion of the law equity has no jurisdiction; and thus we have as one of the primary attributes of equity jurisprudence the maxim *aequitas sequitur legem*. Where the law provides definitely that something shall or shall not be done, equity cannot enjoin the contrary, however the interests of justice may appear to call for its intervention in an individual case. It is the province of the Judge to regard the intention of the legislature and to interpret the letter of the law in accordance with such intention: "Equity is a judicial interpretation of laws, which pre-supposing the legislator to have intended what is just and right, pursues and effectuates that intention."¹⁰

In cases where the law cannot be interpreted so as to give justice under especial and unforeseen circumstances, equity must assert itself by influencing the legislature and thereby relax the rigour of the law by express provision of Parlia-

¹⁰ 1 Wooddeson Lect., p. 192.

ment. In illustration of such equitable relief by statute, where equity was powerless in the Courts, there may be mentioned among others the Statute against Fraudulent Devises and the Married Woman's Property Act. It must not be forgotten that in the early days of English legal history when the rigid provisions of the common law were of such paramount importance, and when equity, as importing justice and analogy alone, was hardly permitted to affect them, a much more liberal equity was being exercised in ecclesiastic circles by the canon lawyers. The canon law had developed into a perfect system by the thirteenth century and was largely influenced by the principles of "conscience" and "reason." The principles were later borrowed by the Chancery Courts when they were established, and were subsequently introduced into the administration of the common law in the fifteenth century for assisting the ignorant, for enforcing verbal contracts and for protecting transactions based upon confidence.¹¹

The principles of conscience are, however, vague and uncertain, and unless they are guided within well-defined limits they may soon lead to a system of justice based solely upon individual and autocratic discretion. "Conscientiousness is good; the standard of the common law itself is in many respects higher than what commonly passes muster among men of good business repute, and it would be disastrous if it were lowered. Still the conscience of the Court, if it is to be an effective power, must not run away from the common sense of mankind."¹²

In a recent publication of the Selden Society¹³ Mr. Bolland discusses the exercise of an equitable jurisdiction by the Justices in Eyre early in the fourteenth century. There was a practice at this time, apparently introduced to enable poor people to reach the ear of the king, of presenting what were termed Bills of Eyre to the Justices in Eyre. These were informal addresses setting out in simple language the whole of the facts relating to the nature of complaint and begging for relief; indeed by their very illiteracy they disclose the absence of any expert knowledge on the part of those who

¹¹ A full account of the influence of the canon law upon mediæval common law is set out in Professor Vinogradoff's essay on "Reason and Conscience" in *L. Q. R.*, vol. xxiv, p. 373.

¹² Pollock, *Expansion of the Common Law*, at p. 116.

¹³ *Eyre of Kent*, vol. ii, *Introd.*, p. xxi (*Seld. Soc.*). [The suitors in this form, however, were not always poor. Some of the claims are on business transactions for substantial sums.—F. P.]

framed them. They were, in fact, no more than mere requests by persons who either from poverty, or for some other reason, were unable to obtain redress at law, and were probably the outcome of an immemorial belief that there existed in the king a right and power to remedy all wrongs independently of both common law and statute law. Whether or not these prayers for relief by Bills of Eyre take us back to the origin of equity jurisdiction in England it is difficult to say; at any rate, they afford an early illustration of the influence of equity in the administration of justice where the assistance of common law was inadequate.

With the development and progress of society there arose from time to time in England, as in other communities, fresh situations which called for departure from the existing stereotyped and inflexible system of law. Just as in Rome it had been found necessary to meet the social advancement of the people by the introduction of the praetorian law at the beginning of the second century B. C.,¹⁴ so also the improving conditions in England under the early Plantagenet dynasty called for a modification of the rigid principles of the common law, and gave rise to the formation of a second and independent legal jurisdiction during the reign of Edward I. At about this time a practice grew up that, when an aggrieved party was unable to obtain redress in the Courts of Law, he might make an application for relief to the King in Council, who thereupon referred the matter to the Chancellor. As these applications became more and more numerous, the Chancellor, as keeper of the King's conscience, was permitted to dispense His Majesty's grace upon his own authority, dealing with the various questions directly, and in the reign of Edward III. the Courts of Chancery were established, in which relief could be obtained where it was not possible in a Court of Law. Thus Lambarde has said, in reference to the nature of the Chancellor's Court, "And likewise in his Court of Equitie he doth . . . cancell and shut up the rigour of the generall law."¹⁵

The name "equity" was applied to that department of law which the Chancellor enforced, because it was generally supposed, and rightly too, that he gave his decisions upon

¹⁴ See Papinian, Dig. 1, i. 7, s. 1 "Quod praetores introduxerunt adiuuandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam."

¹⁵ Lambarde (William), "Archeion" (1635). 46. [The fantastic etymology looks rather as if Lambarde misunderstood John of Salisbury's well-known verse.—F. P.]

the basis of "what seemed reasonable" under particular circumstances, regardless of the set forms of procedure followed by the Courts of Law; though doubtless he was to a considerable extent influenced by both principles and precedents borrowed from the praetorian laws of Rome. He thus exercised a very wide power of discretion.

As a result of the creation of this new jurisdiction, there arose a keen jealousy between the two sets of Courts, and there existed for many years great hardship to litigants owing to this very strict division in principle between the Courts of Chancery and the Courts of Law. "The evils of this double system of judicature," says the report of the Judicature Commission (1863-7), "and the confusion and conflict to which it has led, have been long known and acknowledged." Yet it was not until the year 1873 that the evil was remedied by the passing of the Judicature Act,¹⁸ whereunder the High Court of Chancery, together with the Courts of Common Law and the Courts of Probate, Divorce and Admiralty, were constituted one Supreme Court of Judicature in England. The statute, moreover, provided that for the future equitable relief should be recognised by all branches of the Court, both law and equity to be administered concurrently; that every Judge should have, and exercise, the jurisdiction of every other Judge; and that in the event of conflict between the rules of equity and those of law, the former should prevail. The result of these provisions is that the Supreme Court is neither a Court of law nor a Court of equity, but it is a Court of complete jurisdiction, and though it is split up for the sake of convenience into various divisions—which are too well known to require further comment here—equitable principles are now equally applicable throughout.

It is perhaps unfortunate, and not a little confusing, that in England the terms "equity," "equitable," "Courts of Equity," have been employed also to signify a department of law, that is to say, to distinguish Chancery from Common Law; a more appropriate name, as Austin suggested, for English equity in this restrictive sense would be "Chancery Law." It must, however, be remembered that this is not its true signification, and especially so since the fusion of procedure in the Chancery and Common Law Courts by the

¹⁸ 36 & 37 Vict. c. 66.

Judicature Act, insomuch as equitable remedies were thereby made applicable in every branch of the Court.

It is not uncommonly supposed that prior to the passing of the Judicature Act, the principles of equity were confined in their application to the jurisdiction of the Chancery Courts.

This, as we have endeavoured to shew, is quite a mistaken notion; in fact, it is open to question whether the influence of equity was any less operative in the old Courts of Common Law than it is in the King's Bench Division to-day. True it is that since the Judicature Act equitable precedents and rules are to be observed in the King's Bench Division, but this is a very different thing from the application of equitable principles in the broad sense of reasonableness and natural justice. Indeed, as was said by Sir Edward Coke, "reason is the life of the law, nay the common law itself is nothing else but reason, which is to be understood of an artificial perfection of reason, gotten by long study, observation and experience, and not of every man's natural reason."¹⁷

According to scientific principles and in theory it would seem that the almost universal distinction which exists between law and equity is contrary and unnecessary, and that these two should proceed unsevered in the general interests of justice. This is to a limited extent true, but the teaching of jurisprudence has established that such an ideal cannot be fully realised in practice. Law may be, and should be, guided by principles of reason and logic, but it grows under the especial influence of custom and national characteristics, and though the reins of equity may guide its growth and expansion, the remedies which equity has to offer are far too variable to be combined with legal forms.

It is interesting to notice here the absorption of equity into the common law and the administration of equity through common law forms which has been practised in Pennsylvania to a much greater extent than in any other community, and has stood the test of nearly two hundred years. The wholesale application of equity which this state has established gives to it an almost unique position in legal history, though it is in fact the result not so much of any preconceived juridical system as of a series of experiments

¹⁷ Co. Litt. 97 b, also "*cessante ratione legis cessat ipsa lex*" (Co. Litt. 70 b).

which were rendered necessary from time to time by the exigencies of circumstance. An attempt was surely made there to squeeze equity into the common law, and thus avoid the necessity of a separate jurisdiction; but this attempt was unsuccessful; indeed it presented but another example of the impossibility of combining equitable remedies with common law methods. Chancery Courts had existed in one form or another in every one of the American colonies, and Pennsylvania eventually discovered that they were essential. The practice adopted in Pennsylvania has its advantages, but at the same time it introduces certain difficulties, and it is not unreasonable to assume that in many instances the equity administered therein is not a technical equity, as we understand it, but is rather that form of natural justice which Austin has characterised as the "Arbitrium of the Judge," and which not infrequently imports a dangerous discretionary element.¹⁸

Historically the beneficial operation of equity in the solution of difficult and unforeseen problems affords striking proof of the incompetence of the common law to do complete justice without the aid of equitable relief.

Indeed, it may be said that the principles of equity have inevitably influenced the growth of the common law from the very first. And though the compilation of decisions of the Courts increases year by year, there still come up for the opinion of the Court innumerable cases for which there is no precedent to guide it in coming to a conclusion, and in such cases the Judge has to exercise his own discretion, having regard to what seems fair and reasonable under the particular circumstances, that is to say, to equitable considerations. To this extent, therefore, equity still pays its part in the expansion of the common law, as Blackstone had recognised long ago. "Where the subject matter," he said, "is such as requires to be determined *secundum aequum et bonum*, as generally upon actions on the case, the judgments of the Courts of Law are guided by the most liberal equity."¹⁹

Where there are precedents applicable to a given case, the decision of the Court must as a general rule follow them, whether or not they appear to effect justice and equity in the opinion of the Judge whose duty it may be to enforce them.

¹⁸ See Fisher on "The administration of equity through Common Law forms" (Select Essays in Anglo-American Legal Hist., vol. ii. p. 810.)

¹⁹ 3 Black. Comm. 430.

Equity is assumed to have played its part in the formation of the precedent, and is not permitted to vary it when created unless the surrounding conditions are exceptional. The common law would, of its very nature, be valueless if it might be disregarded wheresoever it appeared contrary to the spirit of justice in the eyes of an individual Judge.

From time to time, however, circumstances present themselves in which a modicum of equitable discretion might well be allowed to vary the letter of the law, and thus give effect to the spirit of the law, which is above all, justice. Indeed, in the commercial Court to-day there is evidence of the application of a much broader equity than is permitted to assert itself in any other Court. The difficulty is one of degree. For, as has already been noticed, equity is of necessity a variable quantity—an uncertainty which has been described by John Selden in these words: "Equity is a roguish thing; for law we have a measure, know what to trust to; equity is according to the conscience of him that is Chancellor, and as that is higher or narrower, so is equity."

This illustrates the grave difficulty in the way of granting to equity an extended influence in the administration of the law. If precedents might be disregarded according as each Judge thought equity demanded it, the variable doctrine resulting therefrom would become the only guide for the Courts and, paradoxically speaking, no decision could ever be decisive. Such a state in the process of the law has been contemplated by Mr. Justice Story in his work upon Equity Jurisprudence, and is there characterised as despotic.

"If, indeed," he says, "a Court of Equity in England did possess the unbounded jurisdiction which has been thus generally ascribed to it, of correcting, controlling, moderating, and even superseding the law, and of enforcing all the rights, as well as all the charities, arising from natural law and justice, and of freeing itself from all regard to former rules and precedents, it would be the most gigantic in its sway and the most formidable instrument of arbitrary power that could well be devised. It would literally place the whole rights and property of the community under the arbitrary will of the Judge, acting, if you please, *arbitrio boni indicis*, and, it may be *ex aequo et bono*, according to his own notions and conscience, but still acting with a despotic and sovereign authority."²⁰

FRANK TUDSBERY.

²⁰ Story, Equity Jurisprudence, 2nd ed., p. 13.

EDITORIAL.

The 36th annual meeting of the American Bar Association will take place at Montreal on Monday, Tuesday and Wednesday, the 1st, 2nd, and 3rd of next month. The meetings of the association are always of great interest as addresses are given by the most distinguished jurists on the American continent, but the present session will be particularly so as among those to be present are Viscount Haldane, the Lord Chancellor of Great Britain; Edward Douglas White, Chief Justice of the United States; Maitre F. Labori, Batonnier de l'Ordre des Avocats a la Cour de Paris, France, the great defender of Dreyfus; the Hon. Joseph Choate, the Hon. Elihu Root, and the Hon. Frank B. Kellogg, President of the American Bar Association, the Prime Minister, the Minister of Justice, and other gentlemen of equal distinction.

The annual address is to be given by Lord Haldane on the subject of "Higher Nationality"—a Study in Law and Ethics. Ex-President Taft will deliver an address on "The Tenure of Judges," a subject which has been so much under discussion in the United States during the past year. Many important addresses will be also delivered by distinguished members of the association on matters of paramount interest to members of the Bar, and members of the Ontario Bar in as large numbers as possible should endeavour to be present and meet their distinguished confreres from the various parts of the world who are to be present at the meeting of the association, which has honoured Canada by holding its first meeting in the Dominion at Montreal.

Arrangements have been made for various entertainments, and those intending to be present should communicate with Mr. R. O. McMurtry, Dominion Express Building, Montreal, who will see that they receive proper accommodation.

Among the many interesting events will be the conferring of honorary degrees by McGill University on a number of the distinguished guests of the association.

It is to be hoped that Ontario will be well represented and efforts made to induce the association to hold its annual meeting at an early date in Toronto.

The editor will be very pleased to forward information to any member of the Bar desiring to be present in Montreal at the meeting of the association.

SUPREME COURT OF ALBERTA.

JUDICIAL DISTRICT OF CALGARY.

CRIMINAL SIDE.

REX v. ARTHUR PELKEY.

Portion of charge to jury on law as to prize-fighting.

A prize fight is defined by the Criminal Code (sec. 2 (31)), as "an encounter or fight with fists or hands between two persons who have met for such purpose by previous arrangement made by or for them."

It is somewhat singular that though this definition has been a part of our law since 1881, I have not been able to find any reported decision in which it has been considered by a Superior Court;—the only reported cases of which I have found any record have occurred within the last 13 years and are decisions, one of a District Magistrate of Quebec (*R. v. Maber* (1901), C. C. C. 446), in which he found the act complained of a "prize fight," and the others of County Court Judges of St. John, N.B. (*R. v. Littlejohn* (1904), 8 C. C. C. 212); Hamilton, Ont. (*R. v. Wildfong*, 17 C. C. C. 258), and Toronto, Ont. (*R. v. Fitzgerald*, 19 C. C. C. 148), in all of which convictions made by the police magistrates were set aside. While I express no opinion as to the correctness of the decisions in any of these cases on the facts that existed, I am unable, after the most careful consideration, to accept all of the general propositions in these cases.

I agree with them that the presence or absence of a prize which is suggested by the name has no significance whatever. There is nothing suggesting a prize in the definition, and section 108 makes it abundantly clear that the absence of a prize cannot affect the character or legal consequences of the fight unless it is accompanied by the fact that the fight is the result of a quarrel or dispute, in which case it is none the less a prize fight and illegal, but the punishment may be made lighter or even dispensed with. Such a fight as suggested by section 108, viz., one the result of a quarrel and which is not for a prize or money is not such a fight as we think of at all as included in the ordinary meaning of the term "prize fight," but as it is included under our Code it is apparent that the definition of "prize fight" is intended

to comprise more than is ordinarily understood by the term instead of less as apparently considered in the last reported case, where the learned Judge in effect, holds that our definition means that a prize fight is a prize fight as theretofore known, subject to the limitation and qualification of the rest of the definition. The definition of prize fighting at common law as given by the cases referred to appears to me to be more restricted than the authorities warrant. It appears to be taken from a case decided in 1878 in England (*R. v. Orton*, 14 Cox 226), in which a Court of Judges held that on the facts of that case the charge to the jury was correct in which the Judge said, that "if it were a mere exhibition of skill in sparring it was lawful, but if the parties met intending to fight till one gave in from exhaustion or injury received, it was a breach of the law and a prize fight whether the combatants fought in gloves or not."

Now, it seems apparent that was not intended as a comprehensive definition of a prize fight, but simply an indication of what on the facts of that case it was necessary for the jury to consider. It is quite apparent also, from the fact that the two alternatives suggested do not cover the whole field.

In a later case in 1881 (*R. v. Coney*, 51 L. J. M. C. 66), the facts as stated in the report of the judgment which are therefore apparently all that were considered material were that two men at the close of the Ascot races engaged in a fight near the road, that a ring was formed with posts and ropes, that they took off their coats and waistcoats and went into the ring and fought for a considerable time in the presence of a considerable number of people.

The question for consideration there was whether three persons who were passing and, attracted by the crowd, had gone to see what was going on and were looking on were liable as participants. The eleven Judges, by a majority of eight to three, held that they were not necessarily liable, it being for the jury to say whether they were in fact aiding or abetting the fight, but it was necessary to determine first that the fight itself was illegal. With only one exception, the Judges were agreed that this was a prize fight, though there is no suggestion that the fight was prearranged or that the participants had fought or intended to fight till one was exhausted. One of the Judges, the author of a standard treatise on the Criminal Law (Stephen, J., p. 73), said: "The

injuries given and received in prize fights are injurious to the public, both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because prize fights are disorderly exhibitions and mischievous on many obvious grounds." Another Judge (Cave, J., p. 68), said: "The true view is, I think, that a blow struck in anger, or which is likely or is intended to do corporal hurt, is an assault, but that a blow struck in sport and not likely or intended to cause bodily harm is not an assault." Russell in his comprehensive work on Crimes, says (7th ed., p. 785): "Prize fighting," etc. He notes that there are to be excepted sparring matches with proper gloves and fairly conducted.

The evidence in this case gives some indication of what is considered "sparring," for the witnesses speak of the opening of this contest as more like "sparring" or feinting than boxing, and the Century Dictionary defines the verb, "spar" as meaning "to make the motions of attack and defence with the arms and closed fists; use the hands as if in boxing either with or without boxing gloves."

It is stated in the English Encyclopædia of Law (vol. 2, p. 385), "That the line between unlawful and lawful contests of this kind is fine."

You will probably have gathered from what I have said that the English law on this point is to be ascertained from an examination of the cases, there being no statutory definitions. That was the state of our law when the statute was passed in 1881 defining prize fighting and fixing penalties in respect of it. The purpose of the definition was of course to make definite what was indefinite, which is another way of saying "to define." By the same Act provisions were made for preventing a contemplated prize fight. It seems apparent therefore, that it must have been intended to render it possible to determine whether a proposed contest was to be a prize fight without the necessity of referring to the actual conduct of it.

The difficulty in construing the definition appears to be in the words "encounter or fight." I am of opinion that they do not mean "either an encounter or a fight," but rather "an encounter of the nature of a fight, or that could be designated as a fight." I take it that the word fight is here used with its ordinary meaning, which is hard to define in simpler terms. You probably understand it quite as well as I do

or as I could explain it. It suggests to me a contest or struggle in which one strives to overcome or conquer the other. It is not an uncommon use of the word to speak of a fight between two boys to see which will be ahead of the other in his class. But in the present case, the only fight to be considered is one with the fists or hands. It will include what was theretofore known as a prize fight between pugilists as also a fight arranged between persons who are not pugilists, but would not include boxing when it is carried on as an exemplification of what has been called the manly art of self-defence, though it might, if the contest were typical of what might be designated as the brutal science of attack. It appears that if the purpose is an exhibition of sparring or boxing on its scientific side it is not within the definition and is unobjectionable, whereas if it is a contest in which one strives to conquer the other by blows and has the other accompaniments it is a prize fight within the definition, and I am of opinion that under our definition there is nothing to warrant the conclusion that the contest must be of such duration as to shew that the intention is to exhaust or wear out one or both of the combatants. Of course every prize fight would be an exhibition of the science of boxing if between competent persons, but the exhibition feature would, as far as the contestants were concerned, be only an incident—the result of the contest being the important thing.

It is necessary, then, to apply the distinction to the facts of this case.

We find that the accused and the deceased met by virtue of an arrangement previously made for them for a contest with their fists or hands, for the fact that gloves were worn as the cases point out, does not prevent it from being a contest with the fists or hands.

The question then is, was it an "encounter or fight," as I have explained that term?

It is suggested that it was not because a part of the arrangement was that it should be for ten rounds only with no decision at the termination. The affair was advertised as "Boxing, Burns' Arena, Calgary, Saturday, May 24; Second round of the Elimination Series for the World's Heavyweight Championship, Luther McCarty, the World's Heavyweight Champion, vs. Arthur Pelkey, of Calgary, Claimant of the World's Championship; 10 rounds," indicating that the world's championship was at stake. One of the contestants

was described as the world's heavyweight champion, and the fair inference to be drawn from the notice is that the winner would carry the title. It was so well advertised that there were 3,000 people present and \$8,400 was paid in admissions. The ring was prepared in the same manner and in other respects the contest was conducted, as far as it went, in the same way as many other contests in which the deceased had taken part with some possible slight modifications.

Except for the number of rounds, the matter of decisions, and the weight of the gloves, the evidence seems to indicate that the contest was to be conducted according to the same rules as the fight between Johnson and Jeffries, which is stated to have been a prize fight and held in the only one of the United States which then permitted prize fights, and in which, one of the questions and answers suggests, there was much brutality. The manager of the deceased seemed to consider that the only difference between such a contest as this and a prize fight was that there was no prize or money dependent upon the outcome of this. This of course is unimportant under our law. Mr. Smith, the referee, a recognized sporting authority, who states that he has acted as referee at more than 100 contests, says that he has been trying for 25 years to find out what the difference between a prize fight and a boxing match is.

They both appear to have in mind such a contest as took place here and there seems little room for doubt that they know prize fights. Their evidence is therefore important in this connection to enable you to determine whether there is any essential difference between this contest and a prize fight, for if there is not it is a prize fight.

You are entitled to consider the weight of the gloves to determine what the intention of the parties was, but if you are satisfied on the evidence that the intention was to fight as I have explained, the size or weight of the gloves bears no significance. The fact that it was for 10 rounds only without a decision is also to be considered by you in considering whether it was a mere scientific exhibition, but you must take this in conjunction with the advertisements and other facts. The advertisement suggests that one of them will carry away the title of champion. Now, how was that to be accomplished on the part of the one who did not have it except by defeating the one who held it? The evidence shews that when the deceased fell the referee counted 10 and

then indicated that his opponent had become the winner by virtue of a rule which provided for just such a consequence.

It is suggested that a man would not become exhausted in 10 rounds and that therefore one of the elements necessary to make this a prize fight did not exist. As I have already indicated, this is not a necessary element and moreover it is for you to consider whether the fact that one of the contestants could win from the other, only by knocking him out, as the witnesses have phrased it, and that, too, within 10 rounds, might not itself conduce to greater severity and thus greater danger, than if the contest could be of longer duration, or if there could be a decision by the referee.

There are other facts for you to consider, such as that the contestants were professional pugilists, that the contest was a public one, arranged apparently solely for business purposes and such things, also that one of the witnesses states that the contest had not yet become interesting or exciting, and that another states that in such contests he has seen men knocked out. All of the facts are to be considered both for and against. It is suggested that amateur competitions are conducted under the same rules and are as likely to result in injuries. There is this distinction, however, that school or Y. M. C. A. competitions or sports of such a character are usually open to all competitors and are therefore not contests previously arranged for between two persons and thus do not come within the definition. As indicated also by what I have read you from the cases and text-books, the danger of injury is not the only reason in law for holding prize fights illegal, there being other objectionable features which would be absent from most amateur affairs. It has been shewn that this affair was orderly and that a police officer was there in the discharge of his duty, which was to prevent it from becoming disorderly, but not to stop the contest, which it would have been his duty to prevent if it had been a prize fight. I think little weight should be attached to this fact, for, whether the police thought it illegal or not, does not affect the question of whether it was in fact illegal, and, in view of the only decisions in the Canadian Courts, it is not surprising that the police should have considered themselves not justified in interfering.

If you find that it was a prize fight, you will do so upon the interpretation of the law which I have given you, which, as I have shewn you, differs in some respects from former in-

terpretations. The fact that many reputable citizens were present also is of no importance. Probably if they had not believed it legal many of them would not have been there, but their belief could in no way help to make it legal.

James Short, K.C., for the Crown.

A. L. Smith, for Pelkey.

EXCHEQUER COURT OF CANADA.

AUDETTE, J.

APRIL 10TH, 1913.

FELT GAS COMPRESSING COMPANY AND A. J. PARIS, JR. v. WILLARD O. FELT, R. S. WALKER, TRUSTEE; A. PARK, LUCINDA J. BISNETT, ADMINISTRATRIX OF C. L. BISNETT, DECEASED, R. L. BRACKIN AND J. B. DETWILER.

Patents for Invention—Jurisdiction of Exchequer Court in Cases not Falling within the Statutes—Rights of Parties Dependent upon Contract—Validity of Assignments.

(1) The Exchequer Court has no jurisdiction at common law in actions respecting patents of invention, and where any relief is sought in respect of such matters, the jurisdiction of the Court to grant the same must be found in some statute.

(2) The Court cannot entertain proceedings to obtain a declaration of the respective rights of parties *inter se* arising under assignments of a patent of invention; nor for a declaration that such assignments are invalid; and that the registration thereof should be vacated.

M. G. Powell and Caldwell, for motion for judgment on objections in law.

Dr. Lewis, K.C., *contra*.

AUDETTE, J.

FEBRUARY 17TH, 1913.

THE KING v. CRUMB.

*Public Land—Lease—Information to Cancel—Improvidence
—Knowledge of Crown Officials of Litigation Respecting
Property in Question.*

In proceedings on behalf of the Crown to annul and cancel a certain lease of Ordnance and Admiralty lands, it appeared that, although there was information on their files respecting litigation at one time pending in the civil Courts between the defendant's predecessor in title and other parties with respect to the property demised, the officials of the Department of the Interior issued the lease in question. It appeared, however, that at the time the lease was issued the Department was not aware of a judgment in one of the civil Courts, which decided adversely to the rights of the defendant's predecessor in title.

Held, under all the circumstances, that the lease was issued through inadvertance and improvidently, and that the same should be cancelled.

2. The officers of the Crown should have satisfied themselves before issuing the lease that the litigation, of which there was knowledge in the Department, had first been disposed of in favour of the applicant.

Swayze, for the plaintiff.

Gorman, for the defendant.

AUDETTE, J.

MARCH 10TH, 1913.

THE KING v. A. O. AND C. N. FALARDEAU.

*Expropriation—Water Lots—Prospective Value—Remoteness
at Date of Expropriation.*

The Crown had expropriated for the purposes of the National Transcontinental Railway a discarded lumber cove near the city of Quebec, with all the buildings and wharves erected thereon. In the days of wooden ships, and when the lumber trade was flourishing at its best in Quebec, the

property in question was worth a great deal. After that time the property had very much depreciated in value, but the defendants relied upon the prospective capabilities of the property for docking purposes, when steamers in the St. Lawrence trade became too large to proceed up the river to the port of Montreal.

Held, that such a rise of the property was too contingent and remote at the date of expropriation to be regarded as an element in the market value of the property.

Flynn, K.C., and Choplean, for plaintiff.

Baillargeon, for defendants.

AUDETTE, J.

MARCH 17TH, 1913.

CANADIAN RUBBER CO. OF MONTREAL, LTD. v.
COLUMBUS RUBBER CO. OF MONTREAL, LTD.

Trade Mark—Infringement — Similarity of Mark—Injunction—Damages.

Plaintiff company was the duly registered owner of a general trade-mark consisting of an effigy of Jacques Cartier surrounded by the words, "The Canadian Rubber Company of Montreal, Limited." The plaintiff, and its predecessor in title, had been for years large manufacturers of rubber footwear to which this mark was applied. It was established that so well-known was the mark in the trade that customers of merchants handling the plaintiff's goods in the province of Quebec would ask for them by the name of "Jacques Cartier," the "Canadian," or the "Sailor." In June, 1912, the defendant company proceeded to manufacture and sell a certain class of rubber footwear with the effigy of a sailor closely resembling that of Jacques Cartier in the plaintiff's trade-mark, surrounded with the words, "Columbus Rubber Company of Montreal, Limited," in a scroll chiefly differing from the one used by the plaintiff in that it was rectangular in form while that of the plaintiff was round. Defendants' mark was not registered.

Held, that there was such a similarity between the defendant's mark and that of the plaintiff as to be calculated to

deceive the public into purchasing the defendant's goods for those of the plaintiff, and that the defendant should be enjoined from placing on the market and selling rubber footwear and goods bearing the mark as above described.

2. That there should be a reference to the Registrar to ascertain what damages were sustained by the plaintiff by reason of the defendant's interference with its business.

T. C. Casgrain, K.C., and Stairs, for the plaintiff.

A. Geoffrion, K.C., for the defendants.

AUDETTE, J.

APRIL 2ND, 1913.

HARRISON v. THE KING.

Negligence—Public Work—Ice on Approach—Injury to the Person—Liability.

Suppliant sustained bodily injury by falling whilst walking over the footpath on one of the approaches to the Seigneur Street Bridge, over the Lachine Canal, in the city of Montreal. The place where he fell was under the care and control of the Dominion Government; and the superintendent of the canal and his assistants were charged with the duty of maintaining the footpath in question in good order. The accident happened at 11.30 o'clock of the night of the 6th of January, 1912, which date was a holiday. The footpath was in a slippery condition owing to ice, the weather at the time being very changeable. It was shewn by a witness, whose specific employment it was to spread ashes over this footpath for the purpose of preventing accidents to pedestrians, that at four o'clock on the afternoon of the day before the accident he had spread ashes on the spot where the suppliant fell; and that, although it was a holiday, he visited the footpath at two o'clock on the afternoon of the accident and found that the ashes were still there and that no more were required for safety.

Held, upon the facts, that no negligence was attributable to the superintendent of the canal or his assistants, and that the suppliant was not entitled to recover.

Curran, for suppliant.

Hackett, for respondent.

AUDETTE, J.

APRIL 5TH, 1913.

ATTORNEY-GENERAL OF CANADA v. L'HEUREUX.

Constitutional Law — Seizure of Liquor in Possession of Dominion Crown under Authority of Provincial Statute—Illegality—Notice of Action—Prescription.

(1) The provisions of the Quebec Liquor License Act (R. S. Quebec (1909), sec. 14, pt. 2, chap. 5, title IV.), are not binding upon the Crown in right of the Dominion of Canada. Hence, when a person enters a building of the Intercolonial Railway of Canada and seizes and carries away therefrom certain liquors constituting freight consigned to third persons he cannot justify such seizure and conversion by invoking the authority of the said Act.

(2) Want of notice under Art. 88, C. C. P. (P.-Q.), in an action for damages against an officer, if not specially pleaded by the defendant may be raised at the trial, and evidence then adduced shewing that the requisite notice was in fact given.

(3) Prescription is not a matter coming within Arts. 2267, and 2188 C. C. P. (P.-Q.), and must be raised by the defence filed.

Newcombe, K.C., for the plaintiff.

Marchand, for the defendant.

AUDETTE, J.

FEBRUARY 4TH, 1913.

LAPOINTE, ET AL. v. THE KING.

Government Railway—Negligence — Fatal Injury to Workman—Brakesmen — Defective Coupling on Car—Knowledge of Defect—Acceptance of Risk—Unskilled Workman—Standard of Prudence—Liability.

T. was employed on the Intercolonial Railway as a brakesman. At the time of the accident whereby he lost his life he was one of the crew on a shunter-train working between dif-

ferent stations along the line of the Intercolonial Railway in the Province of Quebec. The coupling device of one of the cars in this train was defective in that the chain connecting the pin and the lever was broken and disconnected so that the device would not act automatically. It is the practice of brakemen to uncouple cars when the train is in motion by means of this automatic device. There are no rules or regulations of the road forbidding the work being done in this way. It was shewn by the evidence that the train hands knew that the coupling on this particular car was defective. The deceased was not a permanent employee and had not acquired that skill in coupling and uncoupling cars that more experienced brakemen have. His attention was called by one of his fellow-workmen to the fact that the coupling was defective but notwithstanding this he undertook to uncouple the car while the train was in motion. Finding that he could not accomplish this with the defective device he went between the cars and attempted to do the work of uncoupling with his hands. He fell between the cars and the wheels passed over him injuring him fatally.

Held, that T. had accepted the risk of making the coupling under the circumstances; and that the Crown was not liable.

(2) If an inexperienced workman knowing from observation of his skilled fellow-workmen that a particular piece of work is hazardous if done in the method pursued by them, undertakes to so perform it, while another and less dangerous method is open to him, he is not observing a proper standard of prudence and ought not to be held blameless if any accident results from his lack of care.

Stein and Lapointe, for suppliants.

Cimon, for the respondent.

LOCAL OPTION AND ITS EFFECTS.

This decision is the first of its kind, relative to the assessment of hotels where Local Option has come into force, and it will, therefore, be of interest to many of our readers.—ED.

In the matter of appeal from the Court of Revision of the town of Clinton. Between:—

JOSEPH RATTENBURY AND THE CORPORATION OF CLINTON.

JOHN J. McCAUGHEY AND THE CORPORATION OF CLINTON.

THOMAS GOULDEN PIKE AND JOSEPH E. REINHARDT AND
THE CORPORATION OF CLINTON.

J. S. Killoran, for appellants.

The Mayor and Reeve, for corporation.

The appellants in each of the above-mentioned appeals, appeal against their assessment, on the grounds of (1), overcharge on land, and (2), that the appellants are not liable for business tax."

The appellants contend that the passage of the Local Option By-law, by the respondents, has reduced the value of appellants' hotel property to upwards of one-half its former value.

A standard author, Weir, on Assessment Law of Ontario, at p. 130, says: "It is a popular error that the costs of the buildings, less proper allowance for wear and tear, and other deterioration, should be the assessed value. By "value of the land" and "actual" value in this section is doubtless meant the market value, or the value as an asset of the owner's estate. Its "actual value, must, however, be measured in dollars, and is not more than what within a reasonable time, and with due care, can be realized from the sale of it."

"Strictly speaking, the value of the land, as of any other commodity, is the price it will bring at the time it is offered for sale." *Squire qui tam Wilson*, 15 C. P. 284.

There is no doubt that the passage of the Local Option By-law in Clinton has most materially reduced the value of

all hotel property there, if it has not made it wholly unsaleable.

The appellants contend, and not unreasonably, that the by-law has reduced the value by one-half. It is a serious question whether any of these properties could now be sold, without their contents or fixtures (which are not assessable), for half the sum at which they are now assessed.

Yet, as shewn by the last cited case, the value of land is the *price it will bring at the time it is offered* for sale.

Adopting McCaughey's present valuation, for assessment purposes, of his hotel property, including stable and sheds, which I believe to be a reasonable estimate, I order and adjudge that the assessment of said property be, and the same is hereby reduced to \$2,500; the rink property to remain at the sum at which it is assessed. There was evidence shewing that the hotel building is from fifty to sixty years old.

I order and adjudge that the hotel property, including the stable and sheds, of the appellant Joseph Rattenbury be and the same is hereby reduced on the assessment roll to \$3,500. The buildings on this property are new, and the whole property is certainly worth \$1,000 more than the McCaughey hotel property.

And I also order and adjudge that the Pike Hotel property, including all of the buildings, be and the same is hereby reduced to \$800.

As to the business tax, assessed against these appellants when they were assessed, those three hotels were "licensed," and properly assessable as "licensed" hotels, for a business tax. But, subsequently, and before appeal, the Local Option By-law was passed by the respondents, which deprived the appellants of the opportunity to renew their license.

The appellants are now all hotel keepers, but not "licensed," and, therefore, they are *not* one of the class of persons mentioned in the Act as liable to business assessment. (See 4 Edw. VII., ch. 23, sec. 10 (1) (h) 1904).

The only hotel keepers defined by that Act as liable to a business tax is "Every person carrying on the business of a " . . . hotel in respect of which a *tavern license* has been granted."

No tavern license having been granted to any one of the appellants they are clearly not within the Act.

In America "hotel" has been held to be a synonym for "inn" (*Cromwell v. Stevens*, 2 Daly. 15).

"I agree that the words 'hotel' and 'tavern' are undergoing a change in their meaning, there being temperance hotels and temperance taverns, as well as houses for the sale of excisable liquors" (per Chitty, L.J., *Webb v. Fagotti*, 79 L. Ta. 684). An inn or hotel may be defined to be a house in which travellers, passengers, wayfaring men, and other such like, casual guests are accommodated with victuals and lodgings, and whatever they reasonably desire for themselves and their horses, at a reasonable price while on their way (Stroud's Judicial Dictionary, 2nd ed., pp. 978 tit. 'inn' and cases cited), which also shews that neither a *boarding* house, restaurant, nor coffee house is an inn."

Inn, hotel, tavern, public-house, the keeper of which is now by law responsible for the goods and property of his quests, are treated as synonymous. (Eng. Act, 1863, 26 & 27 Vict. ch. 41.)

"Taxing acts must be construed strictly, and any ambiguity will entitle the subject to be exempt from the tax." Weir's Assessment Law, p. 49, and cases cited.

I order and adjudge that the "business tax" assessed against each of the appellants be and the same is hereby disallowed, and I order that it be struck out of the Assessment Roll.

And I order the said Assessment Roll to be amended according to all of the said foregoing adjudications.

The appellants, being all clearly entitled to succeed, I allow them their costs, which I fix as follows:—

To the appellant, Joseph Rattenbury	\$1 25
To the appellant, J. J. McCaughey	1 25
To the appellant Joseph Reinhardt	1 25

And I order the said respondents to pay the said appellants the said sum awarded to each, respectively, in two weeks.

If necessary, execution may be issued from the Third Division Court of the County of Huron.

PERSONAL.

Theodore A. Hunt, Esq., K.C., for a number of years City Solicitor for the city of Winnipeg, has recently been appointed Corporation Counsel. Both the city and the new Corporation Counsel are to be congratulated on the appointment, as Mr. Hunt's large experience in municipal law and his success as solicitor most eminently fit him for the position to which he has been appointed. Mr. Hunt is an honour graduate of Toronto University, where he had a wide and most successful course. Great things may be expected from Mr. Hunt in his new position in the handling of the many problems which in a great city like Winnipeg are constantly arising.

Mr. W. E. Jopp, barrister, etc., Swift Current, has taken Mr. R. Maulson into partnership, and the business of the firm will hereafter be carried on under the firm name of Jopp & Maulson.

In the sudden death, on the 8th of July, of Mr. E. V. O'Sullivan, of the firm of Day, Ferguson & O'Sullivan, Toronto, the junior Bar sustained a distinct loss and shock, as few of the young practitioners were as well known as Mr. O'Sullivan. A son of the late D. A. O'Sullivan, K.C., he studied law first with F. A. Anglin (now Mr. Justice Anglin), and later with Mr. Jas. E. Day, who succeeded Mr. Anglin, and who took him into the firm on his call five years ago. Mr. O'Sullivan attended to the very large real estate business of that firm, and was achieving also some prominence in the Courts.

A well-known member of the Delta Chi Fraternity, he was very active among the younger members of the bar and represented that fraternity at some of its conventions. He also was an enthusiastic golfer. Although only twenty-nine years of age he was attacked, on June 28th, by a paralytic stroke and died, in St. Michael's Hospital, on the 8th July, from a tumor of the brain.

The fifth annual meeting of the Institute of Criminal Law and Criminology will be held in Montreal, Wednesday and Thursday, September 3 and 4. The opening session will occur Wednesday at 2 p.m. The Honourable John R. McDougall, editor of the *Montreal Witness*, and Honourable Frank

B. Kellogg, president of the American Bar Association, will deliver addresses of welcome. The annual address will be given by the Honourable Moorfield Storey, of Boston. This will be followed by the annual address of the president, Justice Orrin N. Carter. There will be reports from the following committees: Committees on Indeterminate Sentence, Probation, Insanity, Immigration, and Criminal Procedure. The discussion of these reports will occupy the sessions on Thursday. The meeting will close with the banquet on Thursday. The headquarters and the place of meeting will be the Hotel Windsor.

B. D. Macdonald, barrister, of Saskatoon, has taken as his partner A. Marshall Stewart, M.A., late of St. Andrews, Scotland. Mr. Stewart, who is a son of Principal Stewart, of St. Andrew's University, is a graduate of that university, and has practised as a solicitor in Scotland for some years.

T. Reg. Sloan, of Hamilton, has just been taken into partnership by W. L. Ross, K.C., and the name of the firm in the future will be Ross & Sloan. Mr. Sloan graduated from Osgoode Hall and was admitted to practice at the bar in 1911, and since that time has been associated with Mr. Ross in his law practice in Hamilton. While attending the law school he received practical legal training with the firm of Bicknell, Bain, Strathy & McKelcan, of Toronto, and particularly with James Bicknell, K.C., in litigation, land titles and general practice. He is the son of J. H. Sloan, of Hamilton, traveling auditor for the Federal Life Assurance Company, and is well known there, as Hamilton has always been his home.

Mr. James E. Coulin, who for a number of years has been associated with Atwater, Duclois & Bond, Montreal, has severed his connection with that firm and has joined partnership with Mr. John J. Meagher, under the firm name of Meagher & Coulin.

William Henry Peterson, for many years County Crown Attorney and Clerk of the Peace of Wellington, just passed away at Guelph.

The late Mr. Peterson was father of Clayton Peterson, of Regina. Forty years ago deceased was a member of Guelph's leading law firm, Lemon, Peterson & McLean. The other partners were Andrew Lemon, who later practised his profession in Winnipeg, and Kenneth McLean, still prac-

tising in Guelph, who was centre fielder for the famous Maple Leafs of Guelph, when they won the amateur championship of Canada.

A. H. M. Graydon, of the legal firm of Graydon & Graydon, has been notified of his appointment to the position of Deputy Police Magistrate of London. Mr. Graydon will occupy the bench at any time during the absence of Police Magistrate J. C. Judd, who leaves next week for a six weeks' vacation in the Canadian West. He held the position for several months during the illness of the late Police Magistrate Love, but at that time waived his right to salary.

Judge Hewson, of Gore Bay, was the victim of a serious assault at Midhurst station on the C.P.R., recently. Robert Short, of Toronto, who was very much under the influence of liquor, was raising a disturbance in the coach, and Judge Hewson made complaint to the conductor, who ordered Short off the train at the next station.

Judge Hewson also alighted at that station, as he was coming to Barrie. Short, who was quarrelsome, struck the Judge two heavy blows in the face, knocked him down, and was starting to resume the hammering on his countenance when the Judge managed to get away.

Before Mayor Cowan, the charge of "assault with intent" was reduced to common assault, and Short was let off with a fine of one dollar and costs.

A large number of prominent lawyers arrived at Banff to attend the semi-annual meeting of the Benchers of the Law Society of Alberta. The society will commence to hold its meetings under the chairmanship of James Muir, K.C., president of the Benchers.

Among those who will attend will be the Hon. Senator Loughheed, C. F. P. Conybeare, K.C., Lethbridge; J. C. Bown, K.C., Edmonton; G. C. Green, Red Deer; A. F. Ewing, K.C., Edmonton, and Charles F. Adams, secretary. W. Kent Power, editor of the Alberta Law Reports, will also be in attendance. Owing to the appointment of E. P. McNeill to be a District Court Judge, he has resigned, and his place will have to be filled by the Benchers. A number of important matters will come up for discussion.

The death at Ottawa of ex-Chief Justice Hugh Richardson, Saskatchewan, recalls his early connection with Wood-

stock and the county of Oxford. Mr. Richardson began the practice of law in Woodstock some time in the fifties, the firm being Wilson, Hughes and Richardson. All three members of this firm subsequently became Judges—Judge John Wilson, of Simcoe; Judge Hughes, of St. Thomas, and Mr. Justice Richardson, of Saskatchewan.

Mr. Richardson was the only member of the firm who practised in Woodstock, his first office being nearly opposite the present office of the *Sentinel-Review*. The office was later removed to the south-east corner of Dundas and Light streets, where the late Justice became County Crown Attorney. The firm later on was Richardson and Finkle (the latter being the present postmaster, H. J. Finkle.)

Early in the seventies, Mr. Richardson was given a position in the Department of Justice at Ottawa by the late Sir John A. Macdonald, and some years later, when Hon. Edward Blake was Minister of Justice, Mr. Richardson was named one of the Judges for the North-west Territories. His headquarters were at Battleford, then the seat of government for the territories. When Regina was selected as the capital of Saskatchewan, Mr. Richardson removed there and subsequently became Chief Justice. In that capacity he presided at the state trial of Riel, and it was he who sentenced the prisoner to death.

Since his retirement by reason of having reached the age limit, Justice Richardson has lived in Ottawa. One of his daughters is the wife of General Macdonald of the headquarters military staff; the other daughter is the wife of Judge Ermatinger, of St. Thomas. There is also a son in Winnipeg, Mr. Hugh Richardson. These are the only surviving members of his family.

The annual meeting of the District Judges of New Ontario took place at Sudbury, with Judge Valin, president of the association, presiding. Judge O'Leary, of Port Arthur, was elected president for the ensuing year and the next meeting will be held at Port Arthur. The Judges were entertained by the local bar with an auto ride to the various mines, and in the evening a banquet was held at the Balmoral Hotel. Those present were Judges Stone and McFadden, of Sault Ste. Marie; Judge Hewson, of Gore Bay; Judge Kehoe, of Sudbury; and Judges McKay and O'Leary, of Sudbury. At the banquet, in addition to the Judges, there were present the local barristers and Sheriff Irving, Police Magistrate Brodie, and Registrar Shipley.

MEXICO AND THE MONROE DOCTRINE.

BY T. B. EDGINGTON, A. M., LL. D.

OF THE MEMPHIS (TENN.) BAR.

[EDITOR'S NOTE:—Mr. Edgington has made a special study of the Monroe Doctrine and is the author of a treatise on the subject. His suggestion, made in that work, that hereafter all nations who seek a preference in the payment of contract debts by force of arms must first shew that they have exhausted all their remedies by mediation and arbitration, was one of the two measures adopted by the Hague Conference of 1907.]

When revolution seized upon Mexico, Mr. Taft considered that the Monroe doctrine entailed upon this government unusual responsibilities in respect to foreign subjects domiciled there. He took prompt and resolute measures to secure all the protection for foreign subjects in Mexico that he claimed for our own nationals. The Wilson administration is faithfully carrying out the same policy.

The new administration is now confronted with a new question growing out of the irregular method whereby Huerta seized upon political power.

The administration is reluctant to recognise any government head in Mexico until this fact is determined by an election. Maximilian had learned from the diplomatic correspondence between this government and France that the United States would recognise any form of government which the people of Mexico would, by their own free choice, adopt.

Maximilian thereupon declined the Crown of Mexico. Thereupon an election was held in Mexico, and Maximilian was elected by an "immense majority" of the people of Mexico, and accepted. Later on it devolved on this government to decide that the election was fraudulent.

Any election of a President for Mexico will, doubtless, be carried by the same "immense majority," the same enthusiastic outpouring of the people, that placed Maximilian on the throne of Mexico. An election, therefore, of a President for Mexico will be an election by the machine guns of whatever faction may be in power at the time.

It occurs to me that the best solution of the question would be to recognise the Huerta government at once. This

would simply be a recognition of existing conditions, and not a recognition of any legal or moral right to so administer the affairs of the government of Mexico.

Such recognition would cut but little, if any, figure with foreign governments, except as notice to the syndicate in France, which, it is said, is proposing to loan Mexico \$100,000,000. Mexico had the question up as to the validity of a loan of \$15,000,000 in the year 1859. Mexican bonds amounting to \$15,000,000 were issued under the supervision of Miramon, who was at that time the head of the government of Mexico, like Huerta is now.

The constitutional party of Mexico conceded that all the international obligations must be assumed by the successive governments of the state, yet it claimed that the administration of Miramon was in no sense a government, but that it was only an unsuccessful revolution, and that therefore the obligations created by it were not binding upon the Republic of Mexico.

If Huerta's revolution should be unsuccessful the same defences could be made against the validity of any bond issues during Huerta's self-constituted rule of the Republic of Mexico, that were so successfully made against the \$15,000,000 Mexican bond issue while General Miramon was the temporary head of the Republic of Mexico.

There was, however, a defence of fraud in the sale of the Miramon bonds.

In case the proceeds of the \$100,000,000 Huerta loan are used in the liquidation of the just obligations of Mexico, in whole or in part, which were incurred prior to the seizure by Huerta of the reins of government, the Mexican government will be bound for their payment to this extent, whether Huerta makes good his title as a *de facto* ruler or not. The states of Sonora and Coahuila are carrying on war against the Republic of Mexico. The state of Sonora now controls the entire territory of the state except the port of Guyamas on the gulf of California. The state of Sonora controls all the railroad lines within the state. These railroad lines connect with our systems of railroads in the state of Arizona at Douglass, Naco, and Nogales. Such protection to life, liberty, and property as our nationals are obtaining are accorded to them by the state of Sonora. Under the rules of international law, the state of Sonora is entitled to have this

government recognise her "belligerent rights." The state of Coahuila stands in very much the same relation to us as the state of Sonora. She has control of nearly all her territory. Her railroad system connects with ours at Eagle Pass, and our railroads touch her borders at other points. It is due to ourselves as well as to these two states that "belligerent rights" be granted them.

One of our largest transcontinental railroad systems, the Frisco system, has recently gone into the hands of a receiver, partly in consequence of the embarrassments of commerce and traffic on the Mexican border.

These embarrassments would be largely, if not entirely, removed by a recognition of belligerent rights.

Our government could very well take the initiative in respect to the grant of belligerent rights to Sonora and Coahuila and any other states that may hereafter shew themselves entitled to such recognition.

The recognition of belligerent rights must not be confounded with the subject of the recognition of the independence of these states of the government of Mexico. This recognition of independence is a very different proposition, and one that is not here under consideration.

SOLICITOR'S LIABILITY AS PRINCIPAL.

1. In the recent case of *Lloyd v. Grace*, (107 L. T. R. 531), is enunciated a legal principle of interest, not only in a consideration of the law of principal and agent as a whole, but more particularly to solicitors and lawyers, the class of persons to whom the effects of the decision are particularly applicable.

The rule promulgated is "for the fraud of an authorised agent acting within his authority, an innocent principal is responsible civilly as if for his own fraud, even though he was not benefited by the fraud of his agent."

The essential and interesting part of the above principle is the clause which is the concluding part of it.

The words, "for the master's benefit," in the judgment of the Exchequer Chamber, in the many times cited case of *Barwick v. Joint Stock Bank*, (16 L. T. Rep. 461; L. R. 2 Ex. 259), proved to be the bone of contention in the Court of Appeal. The judgment in the Barwick case (*supra*) was by Willes, J., concurred in by six other Judges, forming the full Court of Appeal.

The facts were as follows: The plaintiff supplied oats to one Davis, who was a customer of defendant, for the purpose of enabling Davis to perform a government contract for supplying oats, on the faith of a guarantee given by the manager of defendant that when the money was received by the bank (defendant) from the government for Davis, the defendant would pay the plaintiff out of that money the amount due him from Davis after any indebtedness from Davis to the defendant was paid.

Davis was at that time largely in debt to the defendant, so much so that it was practically impossible that there should be any surplus to come to the plaintiff after paying off the bank's credit, and this was concealed from defendant by the bank's manager. The bank retained all the money with which to cancel its own claim against Davis, and action was brought by the plaintiff against the bank for the wrong of the bank's manager.

The conclusion there arrived at was, "The general rule is that the master is answerable for every such wrong of the agent or servant that is committed in the course of the ser-

vice and for the *master's benefit*, though no express command or privity of the master be proved."

In giving judgment in the case of *Lloyd*, (*supra*), the foregoing rule, as laid down in the *Barwick case*, (*supra*), was considered, and particularly was emphasis and stress given the words "*for the master's benefit*": and Lord Justice Farwell concluded, that the Court for which he was speaking could not enunciate a different rule, and a number of authorities in which the same principle had been decided and adopted were cited, and he added that the liability of the principal did not extend far enough to include a case where the agent acted with his own benefit solely in view: and in such opinion by Willes, J., Lord Justice Kennedy concurred, but from it dissented Lord Justice Williams.

That a fraudulent act, committed by an agent for his own unlawful purpose, even if done within the ordinary scope of his authority, does not render the principal liable in any manner, seems to be a prevalent and every day notion, even in the legal profession; it was, indeed, strongly argued in the case of *Lloyd*, (*supra*), that in no case of wrongful conversion or fraudulent misrepresentation is a master liable for the act of his servant.

That such a false presumption exists commonly to-day is evidenced by several reported cases, particularly by Lord Justice Bowen in *British Banking Co. v. Charmwood*, (57 L. T. Rep. 833; 18 Q. B. 714); *Ruben v. Great Fingall Co.* (95 L. T. Rep. 214; 1906 A. C. 439).

But any and all *dicta* of such a character as above indicated were side-stepped and disregarded by the House of Lords in *Lloyd's case*, (*supra*), and, shooting holes in the doctrine that the fraudulent act of the agent must be to the personal advantage of the principal. Lord Loreburn said "Mr. Justice Willes cannot have meant that the principal is absolved whenever his agent intended to appropriate for himself the proceeds of his fraud." And he very aptly added, "nearly every rogue intends to do that."

It will also be noticed that Lord Halsbury was equally emphatic in the view that he expressed, remarking that the words "and for the master's benefit" obviously meant that it was "something in the master's business."

In the very old case of *Hern v. Nichols*, (1 Salk. 289), Lord Hall laid down "that the merchant was answerable for the deceit of his factor, though not *criminaliter* but *civiliter*."

The fact that the doctrine that a principal does not benefit by or through the fraudulent act of his agent is immaterial, was clearly shewn by Lord Macnaghten in his usual exhaustive judgment.

In the case of the *King v. Can. R. Co.* in the Exchequer Court of Canada, decided Jan. 22nd, 1913, the case of *Lloyd v. Grace*, (*supra*), was referred to. The question there was as to liability of defendant for the acts of its agent in fraud of the government, in having misappropriated moneys provided by defendant for paying duties on imported goods. The Court, by Audette, J., says, speaking of the *Lloyd case*, (*supra*), "It is true he had not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business, which it was the act of the principal in placing him in."

The Court also quotes the *Lloyd case*, (*supra*), as saying that the *Barwick case* (*supra*), had been misunderstood, and did not mean "must be for the master's benefit," and repudiated the *dicta* of Bowen, L.J., in *Banking Co. v. Charmwood*, 57 L. T. R. 833, and of Darvey, L.J., in *Ruben v. Great Fingall*, 1906 A. C. 439. A similarity was also shewn between the law of Quebec as contained in its civil code, and the rule laid down by the House of Lords, in the case of *Lloyd* (*supra*), which is expressly followed.

THE SCIENTIFIC POLICE.¹

SALVATORE OTTOLENGHI,

*Professor of Legal Medicine at the University of Rome and
Director of the School of Scientific Police.*

Every citizen who is interested in the progress of society acknowledges that, in civilized countries, the police is entrusted with a noble task, which fact is reflected by the science whose aim it is to raise the efficiency of this powerful weapon of social defense. Physicians by whose teaching of hygiene society had been enabled to prevent physical evils to a large extent, felt very much flattered when, having taken up the study of police problems they were asked to assume certain responsibilities in questions of moral hygiene.

Since 1894, when I first tried to introduce a really scientific system into the police by following the inspirations of my master, Cesare Lombroso, I have demonstrated the function of criminal anthropology in such a system. The school of scientific police, founded through my initiative by the secretary of the interior, took its inspiration mainly from the principles of criminal anthropology.²

Since then the works on scientific police have been increasing rapidly; other schools have been established and new departments of police have been created. We must admit, however, that many either have not understood, or have not followed the scientific biological direction essential to a scientific police. Let us, above all, agree on the program and the function of a scientific police.

The technical function of judicial police is an important part of it. It requires the application of scientific methods of describing individuals, taking their photographs and finger prints, reproducing criminal local inquests, and for picking up the tracks of criminals. It comprises the Bertillon system, numerous chapters of legal medicine, and judicial photography. This technical side is only a part of the police

¹ Translated by Dr. Victor von Borosini, Chicago. Republished here from the Journal of Cr. L. and Criminology.

² S. Ottolenghi : L'insegnamento della Polizia scientifica. 1896 Sienna. La police scientifique en Italie. (Archive anthrop. Crimin., 1905). Prospetti sinottici di Polizia scientifica. Roma 1908, p. 260. Trattato di Polizia scientifica. 1 Vol. Identificazione figura. Milano Società editrice libraria. 1910, p. 410.

function. Bertillon, whose system already existed in 1884, did not think then that he had created the scientific police.

I have always considered it my duty to speak of scientific police as Lombroso conceived it in opposition to the empirical system which is in vogue at present. I not only wanted to apply certain new methods of identification, but, for three reasons, I urged the adoption of the new system; (1) to introduce a scientific method, based on investigation, in all the departments of the police. Every preventive and repressive measure ought to be based upon an actual and profound knowledge of normal, and of criminal men especially. Each branch of the police administration should adopt the method, founded upon investigation, i.e., nothing else but the application of Galilei's experimental, objective and rational method, which made experimental science possible. By extending this method to the study of moral evils, modern psychology, psychiatry and anthropology were created. This method, if applied to the police, would serve as a safeguard against errors of any kind. It is the most reliable way to discover the truth. (2) To seek the support of biology, psychology and criminal anthropology for investigations; i.e., to reckon with natural laws when we investigate, cross-examine and report on facts. (3) To rest all police work on the thorough knowledge of man, especially of the criminal type, and to make use of the teachings of anthropology and psychology for the better prevention and suppression of crimes and for the discovery and more efficient supervision of criminals.

The knowledge of the nature of delinquent men will necessarily induce the police and society to adopt a more humane method for fighting criminality. This can be done by employing the best methods recognized by modern pedagogy in the treatment of minors, those methods which have triumphed in the treatment of the insane (Pinel) and have proved a marked success in animal breeding and even the taming of wild beasts.

By studying the individual in his relations to environment, criminal anthropology has taught us that a great many have become criminals through the surroundings in which they were obliged to live. If these conditions are considered and criminals are treated kindly, they may lose their dangerous characteristics. We have learned, besides, that if we treat a criminal humanely and as a friend, he can be

better watched; his guilt, if he is guilty, can be more easily established, and his nature on the whole can be appreciated with greater precision. Criminal anthropology and sociology learned not from books, but from living beings, teach the official the rules to be observed for discovering the nature of the human mind; for appreciating the particular danger of a criminal to society, and for discovering the participants in the commission of criminal acts. Anthropology and psychology inform us about the nature of a criminal, enable his identification, and tell us how to treat him. The psychology of the delinquent gives the officer a cue to his character, which renders him competent to introduce radical changes while enforcing the laws. The present method irritates rather than tames the human animal by developing ideas of persecution, thus increasing in an incredible way the world's cruelty. The knowledge of normal and criminal psychology must convince responsible superior police officers that the whole force ought to be inspired by humanitarian sentiments, by moderation, and by a certain kindness even towards the worst specimens of society, in order to do really efficient work.

The scientific method, with its rules adopted from experimental science, which in turn is inspired by the modern knowledge of mental phenomena must—and this is really the new pedagogy of scientific police—teach the officers and the Judges how to observe, to reason, and to be absolutely impartial in investigations and reports. Besides it must teach the careful preparation of local inquests, investigation as to the accused's character, and the testimony of witnesses, all of which are useful means to discover the truth, rather than the opposite. The application of this method which means a real reform of the police, was first introduced in Italy, where Lombroso founded criminal anthropology, where the phenomena of the mind were examined by the most thorough methods, and where Galilei's method of investigation originated. The method can of course not be introduced by an order of a cabinet minister. Its effect is a remodelling of the whole department not only in culture, but also in education. Our school, the only one in the world at present, accomplishes this high purpose.

Which method must be follow to obtain such results? The anthropological method of investigation studies the

criminal type in prisons first, then in police stations. The method is not beyond the understanding of police officers of average education. It does not require thorough anthropological nor psychological studies. It is to Lombroso's everlasting credit that he applied the experimental method to the study of the delinquents in prison and in liberty in scientific laboratories. It is astonishing how the prisoner who serves his term, willingly submits to anthropo-psychological examinations and how he discloses his nature. Some (Reiss in Lausanne e.g.) maintain that such conditions are not normal. Quite the contrary. The prisoner under a minute but courteous examination, questioned humanely and kindly even, as to his most secret psychological phenomena, reveals himself and his mental development and shews how great a menace he is to society. The examination takes place in the following way: It begins with the physical examination, similar to the one needed for a description, which is to ascertain anomalies and characteristics of the delinquent's nature, and the very interesting marks of his life, like certain traumatic scars (from falls or wounds) or certain tattoos. The examination of the wrinkles, and of the contractions of facial muscles, will disclose even the slightest mimic reaction and special mental manifestations. Next comes the psychological examination as to his intelligence, his senses, and his volitional attitude by appropriate questions suggested by the special case, which ought to furnish a good opportunity for the manifestation of desires, impressions and aspirations of the constantly observed subject, especially while telling the story of his life and during his self-defence. A systematic, biographical sketch with information about the behaviour of the criminal in prison, and outside during military service, in school, and reformatories, as an apprentice and in the family circle completes the information. Thus our dangerous criminals are studied in prison just as we study the sick in hospitals. By these means we transform the prison into a place of study and observation, in which the prisoner takes an active part, compensating society in this way for what is done for him. An official, who acts according to these rules, will get a real knowledge of criminals, which, once the method is acquired, will be completed by observing the delinquent at liberty, in his daily fight against society and the authority of the police. Observations made on delinquents in prison can im-

mediately be used by the prison authorities, and later by the police, charged with watching the man and preventing him from becoming a backslider. Long explanations are not needed to shew the usefulness of applying the method by the police for watching and hunting up of criminals for getting informations, for questioning and for local inquests. As an example, let me describe the biographical card for an accused person, introduced in Italy in 1903, which serves as the basis for every measure taken in criminal cases. It contains the personal, physical, and psychological description, how dangerous a man he is, his ability to work and the most important facts of his life. A complete card cannot, of course, be filled out during one examination, but later different officials who know the man, will furnish impartial additional information for the Judge. Thus the card is a documentary index to the whole history of the person in the criminal records. In questioning the official again has an opportunity to apply to a large extent his knowledge of psychology, while he watches with keen interest the facial expression, in order to detect his most secret emotions, to discover the most cunning dissimulations. The anthropo-psychological method will be widely used in local inquests where the official must not only be expert in the technic of photography and of taking and recognizing finger prints, but also a keen observer. Thus he will increase his usefulness. He should further be absolutely impartial and rigorous in his report, which ought to be complete, logical and true, so that they may serve as a most important document for judicial instruction.

What has Italy done so far? Italy is the only country with an official school of scientific police for all the departments connected with the police. My course on the scientific police, given at the University of Sienna from 1896 to 1901 was, by order of the Secretary of the Interior, given in Rome after 1902 for superior officers of the police. The course was part of the curriculum of a school started in 1903 with a complete number of studies for students designated to become chiefs of police. They must live for four months at the school, and give proof of having profited by their studies. Besides description (Bertillion system and dactyloscopy) and legal photography, the principal courses consist in judicial investigations and applied anthropology and psychology. Both of the latter are taught according to

the above-mentioned principles, resulting in a complete reform in police methods. The course is given with the help of convicts in the prison, in the proximity of which the school is located. The prisoners are introduced during the lecture, and are questioned and examined minutely in presence of the class. The delinquent almost invariably understands that he serves as object lessons, and voluntarily helps by giving all the more important information. He does not shrink from shewing his mind and his desires to those who treat him kindly. The new officials learn above all in our school to treat the prisoners well; they see that kind treatment is the first step towards making the criminal less dangerous, towards winning his confidence, and thus being able to exercise a beneficent watch over him, which widely differs from persecution. Up to the present time we have given twelve courses, attended by 650 officials besides lawyers and graduates of the Technical Institute. A more elementary course of scientific police is given to pupils of the school of carabinieri. The police school has a laboratory, for research work and demonstrations and a criminal museum. The laboratory besides being used for school purposes, serves for investigations by the judicial police.

The penal and penitentiary functions in civilized countries are increasing and with the tendency towards transforming prisons into workhouses and reformatories, the reform of the police functions, according to the trend of things in Italy, is of importance in every country for the safety of its citizens and for humanity's sake.

THE SCHOOL OF SCIENTIFIC POLICE IN ROME.*

VICTOR VON BOROSINI.

I was asked last year to translate an article written by Professor Salvatore Ottolenghi on the School of Scientific Police at Rome. It was extremely difficult to follow the learned professor's arguments and reasoning, but evidently something absolutely new was being tried in the eternal city. It seemed that the Roman experiments deserved a more intimate study. As I had to be in the capital of Italy last summer, I made a special effort to spend my early morning hours at the school, where I met with the kindest reception, not only by the director and the staff, but also by the pupils. Moreover, through Professor Ottolenghi's kindness, I got permission to visit prisons, reformatories, police stations and other institutions in and around Rome and Naples. Being for weeks in daily contact with the teachers and students, I was able to form an opinion on the practical results of the teaching and the influence of the teachers on their pupils. It has rarely been my privilege to meet a group of students who were as enthusiastic about the theoretical and practical side of their work, and who at the same time, had such a high conception of the great responsibility of their future work as police commissioners, as the men in the school in Rome.

Professor Ottolenghi is an Italian alienist of very high standing in his science. His master was Cesare Lombroso, with whom he studied in Turin, and whose theories, though slightly modified, are the guiding principles of the school. Ottolenghi initiated a course in applied psychology, criminal anthropology and the task of the public police at the University of Sienna in 1896. He continued his work in the Tuscan city until 1901, when the authorities in Rome became interested in the possibilities of the course and promoted him to a professorship in Rome, where he continued his teaching. The police administration of Italy is placed in the hands of the secretary of the interior. The honourable Giolitti was at the head of the department at that time and the director of the bureau of public safety was Signor Leonardi.

*From the Journal of the American Institute of Criminal Law and Criminology.

Both men rendered most valuable assistance to the school by putting at its disposition all the resources of the capital. The lectures are given at the prison of Regina Coeli, where over 1,500 prisoners are serving time, where others are kept pending trial, and which serves as an exchange for hundreds of men and women who every year are, for disciplinary or other reasons, transferred to other prisons or labour colonies. Hence there is a wealth of material which can be used for school purposes. The secretary of the interior soon made the course obligatory for police commissioners, who, having successfully passed their civil service examination, served for one year on probation before they could be finally appointed. The institution has grown very rapidly. Every progress made in scientific police work was tried in Rome and if promising success, was incorporated in the curriculum of the school. Here Italy's service of identification is centralized. It can be said without exaggeration, that the brains of the Italian police administration lies in the school of Regina Coeli. From all over Italy lower police officers are sent for a period of several years to acquaint themselves with the different methods of taking finger prints, photographs and measurements.

Professor Ottolenghi explained at the Brussels Congress of Legal Medicine in 1910 his conception of a scientifically administered police, and it seems best to use his language freely in this place.

He contended that scientific principles had been applied in police work long before Bertillon had made public his system of ten measurements and two observations for identification. This method was undoubtedly the best for identifying persons, until the dactyloscopic method was developed by Mr. Henry of London, who was recently murdered in that city. Dactyloscopy is now substituted for the method of the French scientist. By applying scientific methods more generally, the police is going to become more efficient in preventing and fighting criminality. The sciences of anthropology, biology, and psychology inform and enlighten us on the physical and psychological characteristics of men, criminal sociology on the influence of the *milieu*, which is of the greatest consequence on human actions. The police commissioners need moreover a thorough legal training in order to know the extent and the limitation of their own rights and powers. The utmost circumspection should be used in suc-

cessfully tracking and following up criminals from the very beginning immediately a crime has been detected. Therefore, investigations at local inquests should be made methodically in order that nothing which may throw a light on the case may be overlooked. Reports to superior officers and to the investigating or directing magistrates should be absolutely reliable and impartial statements of facts; if, as is permissible, the police commissioner advances any theories of his own, he must expressly say so. The cross-questioning of witnesses and prisoners by a man who knows human psychology, will produce better results than have been obtained hitherto. He is able to look out for quite insignificant changes in the expression of a witness, as muscular contractions and change of colour, which reveal psychological reactions. Criminal anthropology informs us of the danger of certain criminal types to society, and only this criterion ought to determine the length of a prison sentence, or permanent segregation, or the kind of supervision a criminal should submit to while at liberty. Such knowledge ought not to be gained exclusively from books, therefore police commissioners must be brought into personal contact with different types and study them just as the sick are studied in clinics and hospitals by medical students and physicians.

Having identified a prisoner, people would, as a rule, be in ignorance of his personal characteristics, had Lombroso not taught us to draw an inference as to the psychological characteristics of the individual from cranial types, scars and tattoos. The criminal's card record must, if it shall be of any practical use, contain information about his former life and surroundings, as well as about his former penal record. The police, in using scientific methods, is better able to protect society, especially by segregating criminal types in time and thus preventing their propagation. Such measures of moral hygiene are already extensively used in treating some cases of minor and incorrigible criminals. The treatment of prisoners by the police has undergone a revolution. Brutal force and coercive measures have been abandoned for quite as effective but more humanitarian methods which frequently win their good will and confidence.

That is the substance of Ottolenghi's paper. Let us now review the practical working out of his theories at the school itself.

It is located not far from the Vatican, on the right side of the Tiber, and is practically a part of the prison Regina Coeli. The school is a modern building, guarded by soldiers and turnkeys, constructed expressly for its purpose. On the first floor is the office of the director, a small museum of criminology, the Bertillon and dactyloscopic records and the Rogues' gallery. The museum is an imitation of many similar institutions in European capitals. It contains little of interest excepting Professor Ivanovici's marvellous work of making disfigured heads so lifelike that an identification is possible. The case records contain a complete collection of the cards of Italian criminals and a large number of European exchange cards, as foreign police departments send their cards directly to the school of scientific police, which is the distributing agency for Italy. A modern laboratory for the microscopical and chemical examination of sperma, traces of poison and blood is here installed, which is of the greatest value to the public prosecutor, the investigating magistrates and the Roman police. In the psychological laboratory the most up-to-date apparatus is used for registering psychological phenomena, but very simple instruments are used also, which police commissioners may have at their disposal later on.

The second story is used by the service of identification and dactyloscopy; it contains also the rooms of the staff, the library and the class room. The latter is an amphitheatre with antiquated uncomfortable seats for the pupils, which would not be tolerated in a primary school. The benches may be right for boys of 12, but they are absolutely unfit for grown-up men. It seems extraordinary that the state which used excellent discretion in fitting out the school with the best modern science has produced, should have so little consideration for the comfort of the students. This is not only the case in the classroom. The men have no place in which to gather except the staircase and the hallway; the toilet rooms are of inferior type and there are no lavatories. Unfortunately, a good deal of spitting is done, the spittoons are not much used and cleanliness is rather marked by its absence. Moreover, the classroom is over-crowded; instead of two on a bench, we find often three sitting close together. The auditorium is fitted up so that cinematographic and stereopticon performances may be given. The criminals

who have consented to appear before the class for study purposes are brought here directly from the prison.

The upper story is used by the photographic service and by the director of the service of identification.

On the teaching staff, in addition to the director of the school, Professor Ottolenghi, are his secretary, Dr. Falco, Dr. Gasti, who is at the head of the service of identification, Signor Ellero, who is in charge of the photographic department, and Signor Bertini, who lectures on police administration and legal matters. They are all picked men, and belong to the Government service of police as police commissioners. The students are about 27 years of age. The new civil service law requires them to have practiced law for at least two years. They have all served their time in the army, and many have a doctor's degree in law or sociology. Nevertheless, they are treated as schoolboys. They are addressed by the professors in the same way in which an Italian speaks to servants. Since they are mostly from southern Italy, they are a highly excitable group in which the spirit of youth breaks loose quite frequently. Though a number of more dignified and sober minded Northerners try to subdue and pacify them, they occasionally run wild and, as a punishment, the director keeps the whole class after hours at the school. The men receive about \$20 a month from the Government; they live around town during their four months' period of instruction; a few are married. Between courses and in the evening I met them on the corso and we had many animated discussions about police matters in Italy and in the United States. I had their kind co-operation whenever I wanted to see either in Rome or Naples the actual working of the police at the station houses and in night patrol work, especially in the vice-infected or segregated districts of both cities.

Professor Ottolenghi gives four weekly lectures on criminal anthropology and psychology as applied to police work, so that the students become familiar with normal and criminal types of man. It is a theoretical and practical course, in which for study purposes use is made of the prisoners at Regina Coeli and of the inmates of the insane asylum, five blocks away. The school is temporarily transferred to the asylum, when demonstrations of insane patients take place. The art of interrogation and of observation is taught by employing life men as subjects. Their unconscious move-

ments shew instantly the reaction certain questions produce. Particular precautions are taken to avoid the suggestions of answers to witnesses or prisoners, though it is considered perfectly proper to assist the memory in different ways to make people recollect incidents or facts which they had forgotten. The evidence is weighed and discussed and the students learn to discriminate between essential and minor points. Racial, regional and somatic characteristics, together with psychological anomalies, determine the degree of danger of a criminal to society. During his demonstrations Professor Ottolenghi presents and questions different representatives of the same type. A small sum of money, which the prisoners or others who are tested may spend as they please, makes them willing to submit to the tests. This means, besides, a welcome break in the monotony of prison life; for here they can talk as much as they want, the more the better. I quote from Ottolenghi's introductory remarks to shew how this part of the work is carried on:

"I am going to present to you to-day three prisoners guilty of crimes against persons. Let us first get all the available information about their age, occupation and birthplace. The age gives us the possibility to form an idea about the physical and psychological development of the delinquent; the occupation, about his habits; the birthplace, about the *milieu* in which he has grown up. The two latter are highly important factors. As we know, for instance, that certain trades, like the butchers, predispose people to commit acts of violence, while in different parts of the country, thefts, sexual crimes or such of violence predominate. When we proceed to the bodily examination of the man, we must be mindful that certain external characteristics often correspond to a certain stage in the mental development. The physical examination generally reveals to us some facts about the former life of the man, by finding scars, tattoos and the like. In addition we can ascertain whether he was and still is fit to do hard work or not. We finally arouse in the individual psychological reactions, by which the man's inner self may be revealed. By clever and rapid questioning he might be caught unaware and shew certain feelings which he might wish to hide."

After this general introduction the personal and prison records of the man are read, whereupon he is introduced. He is asked to strip to the waist by removing his coat, necktie

and shirt, for the physical examination. The students follow the examination with intense interest, and frequently call Professor Ottolenghi's attention to some salient facts. They constantly interrupt and shew their appreciation of directorial eloquence and science by generous applause. The students are often asked to take an active part in the personal examination and interrogation. Ottolenghi possesses a wonderful and highly dramatic power of making the prisoners talk. The students are later examined on the different cases and are classified according to their answers. The prisoner is treated with kindness and consideration, so as not to hurt his sensitiveness. He is invited to speak freely and without restraint of his family life, his experiences while at work or in the army, about his ideals and his conception of society. A murderer thus often expresses his disdain for a pickpocket, a safe blower for a common thief. Though the code of honour differs from the generally accepted standard, honour and *omerta* exist after their own fashion in the *mala vita*. The men had frequently served 10 to 13 years behind the bars, and shewed the degrading and evil influence of prison life. I was highly impressed by the seeming inefficacy of the Italian prison system, which turns the men into automatic machines or moral and physical wrecks. The reader will easily see how valuable a practical course of the described kind is for future police commissioners, whose whole life is devoted to the work of preventing crimes and to hunting up criminals. I know from what the students told me that the school requires a good deal of study time for mastering alone the material presented by Ottolenghi in these two courses. The only danger in my mind is that Lombroso's theories could be accepted by the students as the absolute truth, and therefore be applied rather mechanically. If this theory about the delinquent were invulnerable, it would be an easy matter to suppress and prevent crime by the permanent segregation of criminal types. Ottolenghi takes special care to instruct students in scientific methods of investigation and in reporting properly the ascertained facts. The men are warned against removing or touching anything which may lead to the detection of the perpetrator of the crime until the responsible magistrate has arrived at the scene of the crime.

Ottolenghi uses the Roman Morgue at the island of San Bernardino for his practical demonstrations of legal medicine. The different characteristic signs of death, outward

signs of the causes of violent death, differences between homicides and suicides are taught. Thus police commissioners are enabled to form an adequate opinion on the discovery of a body as to the probable cause of his death, which must of course be substantiated by a rigorous medical *post mortem*. In the chemical department of the school a survey is given on the condition of the blood, caused by different forms of death, on the examination of sperma and other stains and on the contents of the stomach and intestines when poisoning is suspected. The idea is not to substitute police commissioners for expert physicians and chemists, but to give them a practical, though superficial knowledge of the methods used in scientific examinations. The whole school is occasionally invited to be present at inquests and investigations, and on such occasions the students are even asked to co-operate with the local authorities in finding the criminal. Many students voluntarily join the Roman police in their night patrol work in order to become familiar with the problems and the conditions of the capital.

The teaching of the science of identification is in the hands of Dr. Gasti. After a profound study of European methods he has worked out an individual dactyloscopic system for this service which is adopted for the whole kingdom. His course comprehends the description of the characteristics of a person, including special marks, like scars and tattoos, the teaching of exactly measuring the different parts of the body in accordance with Dr. Bertillon's method, and the proper classification of the cards thus obtained. Finally, the taking of the finger prints and the classification of the cards according to his own method. Dr. Gasti is absolutely convinced that the dactyloscopic method, together with a photograph, both profile and full face, of the accused, will in the future be substituted for the Bertillon system in the whole world, and for this reason he favours discontinuing the taking of measurements. The Italian dactyloscopic cards contain, besides the finger prints and the two photographs, a history of the criminal's life, surroundings and specialty. According to the latter some of the cards are classified also. They are kept up-to-date; police and prison authorities regularly notify the central bureau at the school about the movements of the more dangerous criminals. In case a serious crime has been committed it is not very difficult to find from the cards the men who at the time are not confined, and who among them is probably the responsible perpetrator of the crime. Prospective

witnesses are taken to the bureau of identification to look over the pictures, and are asked to pick out the man they have seen where the criminal act was committed. The finger prints of suspected prisoners are sent to Rome, together with photographs of discovered finger prints in the place. At the school of scientific police they are photographed again, enlarged and compared with cards having similar indices. It might be of interest to know that cases have been not uncommon where even the identity of dead persons has been established by finger prints. Dr. Gasti and Dr. Falco give a more elementary course to exceptionally well qualified members of the Roman police force and prison guards on this very important subject of identification and taking finger prints. Thus all the prisons and each central police station through Italy have a couple of men able to take finger prints and classify them and also to find the dactyloscopic records according to a given index.

Instructions in photography includes the theoretical part, elementary courses and finally the application of the science for police purposes. Above all, the students learn to make use of light and shade in order to get the best pictures of scenes or of persons, which bring out characteristics. Again here the most modern and very common cameras are used, which may be found in every place. How photography can be used to detect falsified bank notes, counterfeit cheques, erasures and the like, forms part of this course.

Being trained and experienced lawyers before they enter the service, the men have naturally a good knowledge of law. But experience has shewn that a course in the application and administration of police law is a necessary complement to the school's instruction. This is given by a man thoroughly acquainted with the matter. If the time is available other legal points are taken up from the point of view of the police, especially such as are related to the legal position and the duties of the police.

It is really an immense field which the police commissioners are asked to master in the short time of four months. I happened to be in Rome when examinations began; the entire conversation during the last days was about the questions they would be asked and the scientific knowledge Professor Ottolenghi expected them to have acquired.

How far-reaching the influence of the school is may be gathered from the fact that not a few police commissioners,

stimulated by Ottolenghi, have contributed to the sociological and criminalistic literature of Italy, a series of highly interesting monographs on conditions in their own special districts. The school has still other effects on the students. It brings in close touch for four months Italians from the high valleys of the Alps and from Sicily; absolutely different types, with very different standards. In daily contact they exchange their views and learn about certain regional particularities, which are extremely valuable from the point of view of a man who is to prevent and repress crime. The personal friendship established during the course facilitates their work later on. Instead of getting through a lot of red tape they might write a friendly informal letter, if they are in need of information. Masonry exists not only among thieves, but everywhere else among groups of people who are interested in the same work. The relations between Professor Ottolenghi and the students were quite unique. He commands their respect; he has infused in them an immense interest in the science he represents and they would do anything for him. They are exceedingly proud that an authority of international fame is their teacher. The reforming influence of the school on the Italian police is already noticeable. The progress is, the world over, undoubtedly along the lines of the Italian method, which enables commanding officers by the particular instruction which they receive in Rome, to do more efficient, preventive work. Prevention is far cheaper to society and far more ethical and moral than repression.

JOTTINGS AND CUTTINGS.

Obstinate Simulation of Insanity.—Schafer observed a man, arrested for burglary, who simulated insanity during nine months in the hope of evading justice. (*Arch f. Kriminal-Anthropologie u. Kriminalistik*, XVLL., June, 1912). He claimed to be an American millionaire and pretended to understand very little German. At the medical examination he simulated vertigo and nodding spasm, emitted queer sounds when told to take a deep breath, and kept the left shoulder higher than the right. He said the left shoulder was the north pole, and the right the south pole. Attempts to reduce the left shoulder forcibly to the normal position failed, but the joint and mobility were normal. The man was placed in the psychopathic ward for observation. He walked around the ward draped in his bed clothes, "like an Indian," probably to be able to drop his shoulder without being detected. At frequent intervals he would stand on the left leg, touch the floor with the tip of the right foot, and then shake the right leg violently. This, he said, was to receive telegrams through the floor.

After having kept up this character for nine months, and so perfectly that an old and experienced psychiatrist was deceived, he was condemned to six years imprisonment. The mental disturbances disappeared at once, the shoulder resumed its natural position and he regained command of his mother tongue. Schafer emphasizes that in his opinion there was no psychopathological basis for the simulation.—*Cr. L. & Cr.*

William A. Pinkerton on the Criminal.—An interview with William A. Pinkerton is published in *The Hampton Magazine* for May, 1912, under the title "Is There a Criminal Class?" in which the famous detective expresses his views on the question framed in the title which are interesting by reason of his long experience with criminals. He says, "I have been for more than fifty years in constant association with crime and lawbreakers. I may fairly claim to have had exceptional opportunities for the study and observation of the operation of the human mind and the motives that actuate those whom society terms criminals. I have reached certain conclusions which do not agree with

the theories of some eminent scientists nor altogether harmonize with the teachings of the sociological schools. I have no new theory to advance, but it seems to me some facts have been generally overlooked.

"No one can study criminals at close range and believe in the existence of a criminal class, regardless of what Lombroso and his disciples may claim. It would not require any lengthy argument to prove this assertion. If there were a criminal class, sharply defined as such and differentiated from the rest of the human race by ascertainable characteristics, then it must follow that there would be a non-criminal class, comprising the rest of the human race and as sharply distinguished as the supposed criminal class.

"Humanity is not thus divided into criminals and non-criminals; there is but one classification that can be made—the class of those who have committed crimes and the class of those who have not yet committed crimes. Within certain limits, varying with the individual, every human being is a potential criminal. I have seen this illustrated so often that I am never surprised to learn that any man or woman, however highly placed and however greatly esteemed, has done something which the law forbids and for which society demands a penalty. On the other hand, however—and this is the bright side of the shield—every criminal is potentially an honest man, and with the right kind of encouragement from society will remain honest by preference. It is my observation of hundreds of criminals whose reform has been complete and permanent that makes this conclusion a definite one. It is this capacity of humanity to turn from evil ways to methods of life which society recognises as right and proper that really proves my first conclusion, which is that crime is an accident to which a moment's carelessness may subject any living person. If these criminals who have reformed and belonged to a different order of humanity from those of us who have so far been fortunate enough not to have yielded to the impulse to crime, how could they have become members of the order to which we profess to belong?

"Great crimes are never planned by men of a low order of intelligence, and the better educated a man is the more dangerous does he become when he turns criminal. There was a case of a western city that illustrates both this point

and the point I previously made as to the complete reform of many criminals.

"The principal bank in this city had been robbed in a most daring manner. At the luncheon hour, when no one but the assistant cashier and a girl clerk were in the building, a stranger had walked in, covered both of them with his revolver and demanded all the cash in sight. They gave it to him to save their own lives, some \$40,000. I was asked to investigate, and certain circumstances led me to believe that some of those employed in the bank were not entirely innocent. It was plain, however, that the actual holdup had been done by some one not connected with the institution.

"A young physician in the city, a man of excellent family, well educated and highly respected, was the person upon whom the clues seemed to centre. He had moved into the community from another town and on investigation I found that while he had been there a similar bank robbery had occurred. We managed, finally, to get evidence sufficient to convict him and he served his time. Upon his release he changed his name, went to New York and engaged in the practice of medicine there. He is now one of the most prominent physicians in that city and occupies a very high social position indeed. He is a member of one of New York's most exclusive clubs and is very particular to scan the lists of applicants for membership and to blackball those whom he regards as undesirable associates. I do not suppose there are three persons alive who know the identity of this exclusive gentleman with the western bank robber.

"I could tell of hundreds of similar cases, all of them illustrating my main point, namely, that there is not and never has been a hard-and-fast dividing line between the criminal and non-criminal classes; that men step from one class into the other and back again with perfect ease and much oftener than the public has any idea; that it is not true that 'once a thief always a thief' any more than it is true that any one is beyond the reach of temptation.

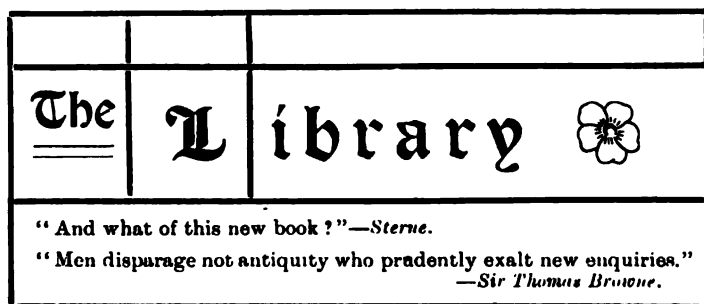
"Hand in hand with the moral agencies which are striving to make crime less attractive, or at least to make honest labour more attractive, there are constantly being developed new methods of preventing crime and of making it more hazardous and less profitable. Not only are means of pro-

tecting life and property constantly being improved but there is no branch of science that cannot be brought to bear and is not utilized on occasion in the solution of problems of defectives that would have been unsolvable mysteries a few years ago.

"It was once a very simple matter for the clever criminal to change his identity so completely that even when his crime was positively known he could remain immune from arrest under the very eyes of the police. First photography, then the Bertillon system of measurements, which has lately been supplemented by a system of classifying individual characteristics, and latest and best of all, the finger-print method of identification, are all operating to reduce the criminal's chance of escaping punishment to the minimum.

"You look forward, then, to the time when there will be no more crime?"

"I do not expect mankind to reach that state of perfection in the near future. I do contend, however, that because of the causes I have outlined, crime is decreasing, criminals are becoming fewer and the number of those who really reform is constantly increasing. After fifty years of experience in the detection of crime and the pursuit of criminals I am still an optimist."—*Cr. L. and Cr.*



Bills of Exchange, Cheques, Promissory Notes, Etc. By Bertram Jacobs. LL.B., (Lond.) Sweet & Maxwell Co., Limited, 3 Chancery Lane, London. Carswell Company, Limited, Toronto. \$2.00.

This handy volume gives in a most concise form, the clearest exposition of the principles and the rules relating to bills, cheques and notes, that have been given to the public for a long time. The work is divided into three parts:

Part 1, dealing with the characteristics of negotiable instruments generally.

Part 2, with those of bills of exchange, cheques and promissory notes, while part 3 takes up in detail practically every section of the Bills of Exchange Act (Eng.), followed by notes on I. O. U. and bills of lading. Forms of practically every instrument referred to in almost every conceivable variation in which they can be found in business are given so that the book itself forms a trustworthy guide, not only for the business man, but also for the solicitor. Decided cases are given at the end of 1912.

Altogether the book should prove one of the most useful negotiably and legally that has recently been published.

Wertheimer's Law Relating to Clubs. By A. W. Chaster, of the University of London, LL.B., and of the Middle Temple. London: Stevens & Haynes, Bell Yard, Temple Bar. Toronto: The Carswell Co. Ltd. Price \$2.75.

This handy, yet comprehensive, volume on this interesting subject, is issued at a time when the formation of clubs of all kinds is on the increase, although the present volume deals with clubs properly so called. The work presents the subject in a very complete form, first defining the word “club,” then taking up the constitution, statutory requirements, con-

tracts and expulsion. The appendix comprises a set of rules and regulations and the different Acts of Parliament which refer to the subject.

A History of Cavalry. By Col. Geo. T. Denison. Toronto: The Macmillan Co. of Canada, Ltd. Price \$2.50.

It affords unqualified pleasure to be able to commend without reserve this most valuable book on the history of cavalry, more especially as the author is a man so well known not only in Canada, but throughout the empire. The esteem in which the work was held by those qualified to judge, is exemplified by the fact that the first edition of the work, published in 1877, won the Emperor of Russia's prize for the best work on the subject, in competition with works written by officers belonging to the armies of the great nations of the world. Not only is the book of interest to military men, but should be read by all classes of people interested in the world's affairs. The classical student will recognize many old friends in the early portion of the book in the chapters on Greek and Roman cavalry.

The work shews the mark of great labour and research, and is without doubt the most complete of its kind, in fact, the only work of its kind published.

Federal Incorporation. By Roland Carlisle Heisler, Gowen Memorial Fellow in the Law School of the University of Pennsylvania, 1910-12. The Boston Book Company, Boston, 1913.

This volume in an able way discusses this most important question and traces the various stages by which Congress became vested with the power to regulate interstate commerce. The rivalries and jealousies which existed between the states, prior to the adoption of this clause in the Constitution, had developed to such an extent that the whole commercial system was in danger until the power of regulation was placed in the hands of the Federal Government. The Interstate Commerce Act, coming into force in 1887, was followed in 1890 by the Sherman Antitrust Act, which in turn was followed by various other statutes as the need arose to deal with this most difficult subject.

Chapter 5 is particularly interesting, as dealing with state legislation with reference to state corporations engaged in interstate commerce, particularly with regard to taxation.

The work shews careful study and research and discusses in a reasonable way this interesting matter.

The Law Relating to Cheques. By Eric R. Watson, LL.B., (London), of the Inner Temple. Butterworth & Co. (Canada) Ltd.

The 4th edition of this popular little work is now published by Messrs. Butterworth, with a number of changes, including new decisions of the past ten years, and other new matter. Although there has been some question as to the law as laid down in the decision of the House of Lords in *Young v. Grote*, the main portions of the doctrine have been maintained in this book, and in doing so, the decision of the author is to be commended, for it is one of the most important cases and of the greatest interest, not only to bankers but to clients, that has ever been decided. The book is a handy as well as a useful one.

The Lawyer in Literature. By John Marshall Gest, Judge of the Orphans' Court, Philadelphia, Penn. Boston Book Co., Boston.

A delightfully readable and interesting book, taking up as it does the very lovable characters of Dickens and the various phases of law which are found in Sir Walter Scott and Balzac. Describing Sir Edward Coke and comparing him with his great contemporaries, Bacon and Shakespeare, the author gives the following description: "There was a volcanic eruption of brilliant men; Coke was born in 1552, Bacon in 1561, Shakespeare in 1564. Why it was that these men unequalled respectively as lawyer, philosopher and poet, should have appeared within the narrow limits of a dozen years is certainly strange, but, as writers always say of what they cannot explain, we shall not stop here to inquire.

"Among these and other men who graced the complex Elizabethan Age, Coke was by no means the least important. He was the oracle and ornament of the common law; a lawyer of prodigious learning, untiring industry and singular acumen, with an accurate knowledge of human nature. He was a Judge of perfect purity, a patriotic and independent statesman and a man of upright life; and to bring us to the subject of this paper, his writings have had more influence upon the law than those of any other writer—certainly in England—who ever lived. And yet there are some who, while

admitting his learning, would deny every other claim just made for him. It is indeed hard to estimate correctly, even after three centuries, those mighty men who then occupied the centre of the stage. Every one who reads the fascinating Elizabethan story becomes insensibly a Baconian or a Cokian, a partisan of one or the other of those wonderful men. They were indeed antipathetic, each doubtless feeling for the other intellectual compassion rather than sympathy.

"We are finding out in the twentieth century what the English lawyers discovered in the sixteenth, that the old common law, with its unsurpassed powers of adaptability and expansion, contains within it the solution of present-day problems, and in our renewed study upon historical lines we cannot have a better motto than 'Back to Coke.'"

Continuing, the author states, "Coke's writings abound with quaint axiomatic, idiomatic and pithy expressions," the following of which are some examples:—

"The common law is an old, true and faithful servant to this commonwealth."

"Perpetuities were born under some unfortunate constellation."

"There is no greater injustice than when under colour of justice injury is done."

"Sometime when the public good is pretended, a private benefit is intended."

A further interesting chapter in the book is "The Influence of Biblical Texts Upon English Law."

Mention must be made of the Introduction, which gives a *resumé* of many of the interesting books of the writers alluded to in the body of the work.

Leading Cases on International Law. By Pitt Cobbett, M.A., D.C.L. (Oxon.), of the University of Sydney, New South Wales. London: Stevens & Haynes, Bell Yard, Temple Bar. 15s.

The present work contains parts 2 and 3 of this work, namely, part 2 dealing with "War," and part 3 with "Neutrality," part 1, "Peace," having been published some years ago. Many changes in the law which have taken place in recent years in the subjects dealt with have rendered it necessary to practically re-write the whole volume and to replace many of the earlier cases with those more up to date. This has been performed with great care and judgment and the

law as set forth in the entries contained in this volume, though brief, is to the point. The notes are full and will be found particularly useful.

Not the least admirable part of this book is the translation of the text of the Hague conventions which deal with the subject contained in the appendix.

The present edition of this work is a valuable addition to a law library.

A Digest of Equity. By J. Andrew Strahan, M.A., LL.B., of the Middle Temple, Barrister-at-Law. Reader of Equity, Inns of Court, London; and Professor of Jurisprudence, University of Belfast; and G. H. B. Kendrick, LL.D., one of His Majesty's Counsel and Advocate-General of Bengal. Third edition. Butterworth & Co., London. 15s.

This digest gives a very concise summary of the law of equity beginning with a history of the Court of Chancery and its prerogatives and how these powers were obtained, followed by a discussion of the law of equitable rights and equitable remedies. Under the former, trusts and trustees in their manifold forms are defined, and under the latter specific performance and bankruptcy. Much care has been taken in the compilation of the references.

NOTES OF RECENT FOREIGN CASES.

Evidence—

People v. Enright, III. 99 N. E. 936. "*Criminal law—Evidence—Privilege of defendant.* In a criminal prosecution where the defendant did not testify, an instruction that the jury should consider as though the defendant was not allowed to testify, was properly refused."—*Cr. L. and Cr.*

State v. Flanagan, N. J., 84 Atl. 1046. "On a trial of the defendant for manslaughter for pushing one from a trolley car, causing his death, evidence of the disorderly conduct of the defendant towards others in the car just prior to the embarking of the deceased and the Act of the defendant which caused his death was allowed to shew his state of mind and continuity of disposition toward those about him on the car. *Held*, that this was competent as evidencing his state of mind as carried forward and exhibited in a Criminal Act."—*Cr. L. and Cr.*

People v. Gibson, III. 99 N. E. 599. *Admissibility of evidence of other offences.* "In a prosecution for statutory rape, evidence that about the same time and in the same room accused committed the crime against nature upon the prosecutrix, and had intercourse several times afterwards, was admissible."—*Cr. L. and Cr.*

"In a prosecution for statutory rape, evidence was not admissible that the accused had intercourse with a playmate of prosecutrix in the same room a few minutes after the act charged; the two acts not being so connected as to be part of the same transaction."

Former Jeopardy—

Roman v. State, Tex. Cr. App. 142 S. W. 912. *Crime used as circumstantial evidence of Another Crime*—Defendant was tried and acquitted for statutory burglary by breaking and entering a railroad car. He was then tried on an indictment for larceny of the contents of the car. His plea of former jeopardy was overruled and the Court refused his request for an instruction that the jury, in determining the question of his guilt of innocence of larceny, could not consider for any purpose whether or not he broke and entered

the car from which the property was stolen. Held, that the common law rule merging burglary and theft when committed contemporaneously and making conviction of one bar a prosecution for the other is abrogated by the provisions of the Penal Code making burglary and theft, though growing out of the same transaction, two separate and distinct offences. While defendant could not be prosecuted a second time for burglary, any evidence tending to shew that he was guilty of theft should be admitted, even though it prove that he was really guilty of burglary. The conviction was reversed on another ground:—*Cr. L. and Cr.*

AERIAL WARFARE.

BY ROBERT E. HEINSELMAN.

"For I dipt into the future, far as human eye could see,
Saw the vision of the world, and all the wonder that would be:
Saw the heavens fill with commerce, argosies of magic sails,
Pilots of the purple twilight, dropping down with costly bales;
Heard the heavens fill with shouting, and there rained a ghastly dew
From the nations' airy navies grappling in the central blue."

Thus wrote the poet Tennyson in 1842, and the Twentieth Century may witness a realisation of his dream. Authorities differ as to the number of aeroplanes and other aircraft now owned by the various governments. It is stated¹ that France has 174 aeroplanes, Russia 150, Great Britain 86, Germany 50, United States 16; and that of dirigible balloons Germany has 30, France 15, Russia 9, and the United States 1; also that by 1915, France will have in the military service 900 aeroplanes and 1,500 trained pilots.

The number of aircraft now owned by any government is, however, comparatively unimportant, because the day of "aerial navies" has only dawned, and the number of aircraft available to-day is insignificant compared with the "fleets" which will, no doubt, sail the skies within the next few years. But if war were declared to-day, it is evident that Germany, with her enormous Zeppelins, would hold the supremacy of the air, and that the United States would fall behind the other great powers in equipment for aerial warfare.

¹ American Year Book, 1912.

But while Germany, with her great aerial battleships, appears to be in the lead, France stands well in the forefront of military aviation. Her activity is evidenced by the steady increase in the French aeronautical budget for the past four years, which is as follows: 1910, \$48,000; 1911, \$400,000; 1912, \$1,024,000; 1913, \$7,593,000. In September, 1912, occurred in France the first review of an aeroplane armada, 72 army aeroplanes, with their full complements of pilots and motor trucks bearing supplies, passing in review before the French Minister of War.

Imagine a naval warship 500 feet long, carrying a crew of 18 men, with room for storage of 5,500 pounds of explosives, and capable of an average speed of 45 miles an hour, and of remaining in the air from 24 to 30 hours, and you have an idea of one of the ships with which Germany is recruiting her "aerial navy." Twenty of these, it is said, with necessary "halls" for preservation when not in use, can be built for about the cost of one of the latest first-class battleships. Consider that an aviator² has made the trip from Paris to London in 185 minutes of actual flying, that an aerial vessel of war, except on a night of brilliant moonlight, would be invisible at a height of 5,000 feet, while the lights of a great city could be easily discerned, and it does not now require the imagination of a Tennyson to fancy the havoc that, in the event of war, a fleet of such Zeppelins might work by sailing up the Thames and dropping a few tons of dynamite occasionally on dark nights on the streets of a city like London.

Turning from the calamities that such enormous air ships might inflict, unless methods of extermination are invented, consider now the military uses of the smaller aircraft, which all the great powers will soon own by the hundred. Their purpose appears twofold,—first, for scouting; second, for attack by dropping or discharging explosives. As to the former, the usefulness apparent from the nature of the invention, confirmed by experiments, assures their value; as to the latter, owing to the meagre tests, their efficiency is more doubtful.

Every great war has called forth heroes who have gladly sacrificed their lives to obtain coveted information as to the movements and power of the enemy. Thousands of Germans, it is said, in the Franco-Prussian war of 1870, were

² French aviator Brindejone.

martyrs to obtain a bit of intelligence regarding the enemy, which a single eye could have secured if elevated a distance of half a mile. Aircraft in war may, in this respect, prove a messenger of mercy. It must not, however, be imagined that the scouting purposes of the aeroplane and other aircraft will be accomplished without deeds of heroism and sacrifice of life. Indeed, it has been suggested that, with the development of aircraft destroyers, victory will lie with that side which has the most numerous and swiftest air flotilla, because that nation can best afford to sacrifice the necessary number of aircraft to obtain the desired information. This will require bravery of the highest kind. That fatalities will be frequent in the use of military aircraft, even in times of peace, seems recognised by the French government, at least, in counting as war service time spent by an officer in the air, although engaged merely in reconnoitering during a sham battle.

What do experiments shew as to the value of aircraft for scouting purposes? Aeroplanes and dirigible balloons have been used in actual warfare in the recent conflicts between the Turks and the Italians in Tripoli and Turkey and the Balkan states.

In the war in Tripoli, the Italian forces were augmented by a fleet of seventeen aeroplanes, which rendered valuable service. Press despatches say that on one occasion several bombs dropped from one of these aeroplanes, caused the death of ten Arabs, and wounded others; that at another time a survey was made by an Italian dirigible of the Turkish position, in which, with three officers, the balloon sailed over the Turkish lines, unharmed by their rifle and artillery fire, and proceeded on its course, dropping bombs until it made a complete and exact reconnaissance of the enemy's camp, estimated the number of Turks and Arabs, took photographs of the position, and in two hours returned with the whole plan of the Turkish position at the disposal of the Italian general.

In press despatches giving accounts of aeroplane and hydro-aeroplane flights by the allies in the recent Balkan War, it is said that a Greek hydro-aeroplane on one occasion made a flight, lasting two hours and twenty minutes, across the Dardanelles and the Niagara dockyard, upon which four bombs were dropped; and that although the Turkish field batteries and warships fired upon it, their fire was without

effect, and the machine made a safe descent. On another occasion, the despatches say, a Bulgarian military aeroplane, while reconnoitering over the fortress of Adrianople, was hit by a Turkish shell and fell inside the lines, and the pilot, a Russian officer, was made a prisoner by the Turks.

Commenting on the value of the aeroplane as a news-gatherer, as demonstrated in the recent Balkan War, Brigadier-General James N. Allison, U. S. A., in a recent number of the *Military Service Journal*, says: "It seems destined to succeed the cavalry as the 'eyes of the army,' doing more certain and efficient work at vastly less cost; for under favourable circumstances it will be easily possible for two men in an aeroplane to discover and report what is passing not only in front, but in rear, of a hostile line, to an extent hopelessly beyond the reach of a cavalry brigade or division."

He comes to the conclusion, however, that the main value of the aeroplane in war will be for scouting purposes, rather than as a destructive agency.

In practice manoeuvres, more than in actual warfare perhaps, the scouting value of aircraft has to date been best shewn. The *London Times*, commenting on the British manoeuvres in the fall of 1912, says that the tactics of opposing strategists were so completely upset by aerial scouting that they had to be prematurely brought to an end.³ "Stolen marches, ambushades, and cavalry reconnoiters were made futile by the ever-present eye of the aerial scout, who sent his warnings down by wireless and made secrecy impossible.

Nearly fourscore aeroplanes took part in the manoeuvres in France in September, 1912. The valuable service performed by them, without a single accident, is said to have convinced many army men that the chief value of the aeroplane is as an aid to the cavalry in reconnoitering.

In the manoeuvres in Connecticut in August, 1912, the most interesting feature was the scouting of the aviator squadron. The work of Lieutenants Foulois and Milling especially served not only to demonstrate the value of the aeroplane as a means of scouting, but the advantage of having trained army men as aviators. Although both were handicapped by being unable to employ field glasses, owing to the necessity of using both hands in the control of their machines, and the former also by reason of making experiments with wireless tele-

³ As reported in *Literary Digest*, October 19, 1912.

graph instruments, yet in his reconnaissance of August 13th, for instance, Lieutenant Foulois, upon return to camp after an absence of six hours, was able to make a report covering two typewritten pages and giving the location of thirteen military bodies; and Lieutenant Milling, in a circuit requiring a little over an hour, gathered detailed information that would have taken half a day for a whole brigade of mounted scouts to have collected.*

Lieutenant Milling also recently made a flight with another officer from Texas City to San Antonio, 244 miles, on which his companion roughly mapped the country.

Since the value of scout information depends largely upon the length of time intervening between its discovery and report, wireless telegraphy will doubtless play an important part in connection with the use of aircraft for scouting purposes. Indeed, during 1912, many wireless messages were sent from aeroplanes flying 30 to 40 miles an hour, and were received at points several miles away. It is reported^b that in France a message from an aeroplane which was flying at the rate of 80 miles an hour was received at a point 50 miles away.

Conceding that aircraft will, in wars of the future, play an important part in gathering information, many military authorities believe that this will be practically their only function. However, it seems probable that they can also do effective work as an offensive agency in a number of ways. For instance, granting that the aeroplane could not carry sufficient explosives to annihilate a battleship because of its armour plate, it is conceivable that it might do destructive work in a navy yard; and admitting that the open formation of modern armies minimizes the danger from aerial attack, it does not seem improbable that they could greatly delay movement of the army and cause disaster by destroying supplies, bridges, railway terminals and connections, powder mills, cartridge factories, light and power plants, gas reservoirs, and in other ways easily fancied so impair the material resources of the enemy as to contribute greatly to his ultimate defeat.

Of course the value of aircraft for all these purposes depends largely upon the accuracy with which explosives can be dropped or discharged from them. To test their value

*Scientific American, August 24, 1912.

^bAmerican Year Book, 1912.

the Michelin of France offered \$30,000 to the French Aero Club, to be distributed as prizes among competitors in the dropping of projectiles. The contest, which closed in August, 1912, was won by Lieutenant Scott, an American, with a newly invented device for dropping explosives. The accuracy with which the bombs, each weighing 15 pounds, were dropped, is interesting. From a height of 656 feet, 12 out of 15 were placed in a circle approximately 60 feet in diameter, and from a height of 2,624 feet, 8 out of 15 were dropped within a rectangle 131 x 394 feet. Of course, these low altitudes in times of war would be extremely hazardous. German regulations place the safety zone above 2,800 feet, and French regulations above 3,000 feet.

Guns will, no doubt, be used by military aircraft to some extent, especially for their own protection. The latest Zeppelins, it is reported, carry a gun above the ballonets to ward off flying men. The first aeroplane gun, invented by Colonel Isaac N. Lewis, of the United States Coast Artillery, appears in a test made by Lieutenant Milling and Captain Chandler, of the Army Aviation School, at College Park, Maryland, to have demonstrated not only the practicability of firing guns from aeroplanes, but that remarkable accuracy can be attained even though the machine is travelling at high speed. The gun has a rate of firing of from 300 to 700 shots a minute. While aerodynamical laboratories for studying scientifically those problems of the air necessary for solution before aviation can reach its fullest development have been in operation for a number of years in France, Russia, Germany, and England, so far measures for the establishment of one directly by our own government have failed. However, through the Smithsonian Institution, the Langley aerodynamical laboratory has been reopened to work in co-operation with the various departments of the government.

At the Army Aviation School, at College Park, Maryland, which was established in June, 1911, the government has been training its future aviators, as well as conducting numerous experiments, such as dropping of explosives, testing of the Lewis aeroplane gun, and taking of photographs from aeroplanes.

With the use of aircraft new legal questions have arisen. The old Roman maxim, *Cujus est solum, ejus est usque ad cælum*, will, no doubt, need new modifications. It is ap-

parent at once that the same freedom cannot be accorded in navigating the air over a nation as in sailing the intervening seas. The traverse of the air above a nation closely resembles in legal aspect the navigation of the marginal seas; and since the freedom of the seas ceases at the 3-mile limit, the point where such freedom might begin to impair the rights of a state, in analogy it would seem that free commerce of the air should be permitted only so far as consistent with the security and privacy of the adjacent state and its citizens.

As regards military aviation, it is desirable that the Third Hague Conference in 1915 shall formulate some universal rules, or international complications, already threatened, are likely to arise. The only regulation so far bearing directly upon aerial warfare which can be accepted as a positive rule of international law⁶ is that adopted at The Hague in 1907, providing that "the attack or bombardment, by any means whatever, of towns, villages, habitations, or buildings which are not defended, is forbidden." However, a "Declaration" signed by twenty-seven states, including the United States, but excluding four of the great maritime powers, Germany, Italy, Russia, and Japan, agrees "to prohibit for a period extending to the close of the Third Peace Conference, the discharge of projectiles and explosives from balloons or by other new methods of a similar nature."

One point concerning which it appears some international regulations should be adopted is the treatment to be accorded captured balloonists and others engaged in aerial warfare. Should they be treated as spies or as prisoners of war? Bismarck in the Franco-Prussian War of 1870 threatened to treat balloonists crossing the German lines as spies.⁶ And in 1904 Admiral Alexieff threatened to shoot as spies correspondents on board neutral vessels "who may communicate news to the enemy by means of improved apparatus not yet provided for by existing conventions," in case any should be arrested within the zone of operations of the Russian fleet. The last declaration was evoked by the presence of a *London Times* war correspondent on board a Chinese despatch boat equipped for wireless telegraphy.

There seems no good reason, however, why those regularly engaged in aerial warfare should be treated differently than those participating in land or naval warfare.

⁶ Hershey on Essentials of International Public Law.

Of course the future of aerial warfare is yet only in conjecture. It is possible that the usefulness of aircraft for attack will be inappreciable, and that, with the development of aircraft destroyers, the results obtainable by them for scouting purposes will be disappointing. On the other hand, it may be that the "aerial navies" of the future will dominate military methods more than any influence since that greatest martial achievement of the centuries, the invention of gunpowder. Probably the principal use of aircraft will be military. For its use in war the armies and navies of the world must adjust themselves—it may be by changes the most radical, or by those only slight. Certainly, indications point to a new era in military annals in which aerial warfare will play an important part.

PASSING OF AIR SHIP OVER PROPERTY AS TRESPASS.

[ED. NOTE.—The following interesting opinion was delivered recently by the appellate division of the moot Court at Rochester, New York. The acting Judges were Messrs. William F. Strang, Paul Folger, and Homer E. A. Dick. Mr. Leo J. Rice appeared for the plaintiff-respondent and Mr. Alexander G. Davis for the defendant-appellant. The August, 1911, "Law of the Air" number of CASE AND COMMENT, and the cases referred to therein, were copiously cited on the argument.]

This is an appeal by the defendant from a judgment of the Supreme Court, entered in Monroe county clerk's office on August 20th, 1912, in favour of the plaintiff, entered upon a verdict directed by the Court at a trial held on that day. The verdict directed was for nominal damages in favour of the plaintiff, and defendant excepted to this disposition of the case and asked to go to the jury upon the question of whether or not the defendant had committed a trespass.

It appeared undisputed at the trial that the defendant is the owner of a piece of property situate on Park avenue, in the city of Rochester, New York, having 50 feet frontage on Park avenue and extending back of the same width 100 feet. On the front part of this property is located a twenty-room house, and on the rear part of the lot is a garage. The defendant was the owner of an air ship or aeroplane, and at the time in question was engaged in carrying the mail from the city of Rochester, New York, to the village of Canandaigua, New York, and to traverse this distance in a direct line, it was necessary for the defendant to pass over the plaintiff's property, and he did so, the air ship being at the time at a height of 100 feet above the ground. The plaintiff claims that the defendant operated his air ship negligently, bringing it to a point within 100 feet of the ground, while defendant claims that his airship was driven to that level by currents of air. It is not claimed, however, that the horizontal position of the air ship was affected in any way by the air currents. On account of the manner in which this case was disposed of at the trial, the defendant is entitled to the benefit of all the facts introduced in his favour, and all the facts warranted by the evidence must be assumed as settled in his favour. *Bank of Monongahela Valley v. Weston*, 159 N. Y. 201, 54 N. E. 40, 45 L. R. A. 547.

The air ship was not owned by the Federal Government, nor under its control, so that we are not concerned with the question of the right of the Federal Government to navigate the air over any portion of the territory within its domain. The fact that the defendant was engaged in carrying the mails has, in our opinion, no bearing upon the case; nor do we regard as important the fact, as claimed by the defendant, that the air ship was driven to its position 100 feet above the surface of plaintiff's land by the air currents. The proof is undisputed that the defendant intended to pass over the plaintiff's property, and if in doing so it was necessary for him to lower his ship to a point so near the surface, that fact does not excuse him, because he placed himself in a position where such a fact might be possible. There was some evidence introduced at the trial that the passing of the ship over the plaintiff's property caused actual damage to him, but this evidence was disputed by the defendant. As a verdict of nominal damages only was directed by the Court, and as plaintiff is satisfied with that verdict and has not appealed from the judgment entered upon it, we will regard the proof as shewing that the passing of the air ship did not cause any actual pecuniary loss to the plaintiff. The question is, therefore, whether the passing of an air ship over the plaintiff's property at a height of 100 feet above the surface is such an invasion of the plaintiff's right that he may maintain an action of trespass therefor.

It was an old maxim of the common law that he who owns the soil owns it to the sky and to the centre of the earth. 8 Am. Eng. Enc. Law, 2d ed. 458.

As Blackstone expresses it: "The owner of real property owns downward to the centre of the earth and upwards to infinity." We think that under the authorities, the passing of the defendant's air ship over the plaintiff's property at the height mentioned was a trespass upon the plaintiff's rights, irrespective of the question of actual damage. Our attention has not been called to any statute of New York State, or of the United States, permitting the navigation of the air over land held in private ownership, nor are we able to find any such statute. Therefore, the rule of the common law applies. If modern necessity requires that air ships should have the right to navigate the air, that is a matter of legislative enactment. We cannot make the law;

we apply it as we find it. We do not mean to intimate that any statute purporting to relieve from liability the owner or operator of an air ship passing through the air or space over land held in private ownership, at a height of 100 feet above the surface, would be constitutional, but that question is not before us for decision.

On the oral argument counsel called our attention to a statute in France which, in effect, purports to license the navigator to sail through the air, and to relieve him from liability therefor, provided he causes no actual damage to the landowner over whose property he passes. While the common law was not part of the law of France, it appears that the legislative body of that country recognizes the necessity of the statute in order to relieve the navigator from trespass.

Our attention has been called to several cases where the facts were held not to constitute trespass. We have examined them with care and think that they are not applicable to the case before us. In *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623, it was held that where one places a steam boiler upon his premises and operates the same with care and skill, so that it is no nuisance, he is not liable for damages to his neighbour caused by the explosion of the boiler, in the absence of proof of fault or negligence on his part. In referring to this case, the Court of Appeals in *Sullivan v. Dunham*, 161 N. Y. 290, at 294, 76 Am. St. Rep. 274, 55 N. E. 923, 47 L. R. A. 715, said: "That was not a case of intentional, but of accidental explosion." Here the defendant voluntarily placed himself and his air ship in a position over the plaintiff's property, and if his air ship was driven to a lower level than he intended it to be, nevertheless he must take the consequences of his voluntary act. It follows that the judgment should be affirmed with costs.

All concur.

III.—POSITIVE RIGHT.

The thesis that Right is essentially a positive conception, is not held, as might be thought, by positivist philosophers alone. These, indeed, start from the principle that legal knowledge is legitimate only when it keeps within the limits of experience; now experience, as Vanni for example says, "only shews us Right as a fact of human society, as a historical phenomenon." It would on this hypothesis be absurd to speak of any kind of ideal Right, rational or absolute, which has no adequate correspondence in the realm of facts, but transcends them. The only Right really existing is that *in civitate positum*, that is, which is in vigour in a politically constituted society, at a certain historical moment, by the effect of determined forces. Such arguments are often repeated by the positivist writers, and repeated with an air of peremptory demonstration; whereas, if carefully examined, they are reduced to an argument in a circle, or to a *petitio principii*, being based on the premise which is afterwards presented as conclusion. The impossibility of a Right not positive is deduced simply from the fact that it is supposed *a priori* that Right is only a phenomenon, and cannot have any other existence than what is empirical. The demonstration of this presupposed dogma seems superfluous to the positivists, who however have no hesitation in discarding, without a true critical analysis, the notion of natural Right in all its forms both ancient and modern. Admitting then that a Right not positive is not a Right, this adjective applied to a Right would be evidently void of meaning; and it is declared in so many words "a pleonasm" by Bergbohm, who however, cannot exempt himself from using it, so vigorous and diffused (to his own infinite scandal) is the belief in a Right superior to this.

But if this simple solution of the problem can be understood as far as regards the positivist school, more grave and significant is the fact that philosophers of other schools also approximate, in a way, to the same solution. Some, inspired especially by Hegel and also by Vico, recognize that the idea of Right is absolute and inexhaustible, and transcends therefore in its essence all of its particular manifestations in the historical field, but on the other hand affirm that only in history is Right a reality. The traditional antithesis between

the Right of nature (or of reason) and positive Right is resolved in this sense, for instance, by Lasson and Filomusi Guelfi; who in like manner deny the existence of all Right other than that which is positive, recognizing nevertheless in this same contingent and changeable Right the impress of an eternal idea, which unfolds itself in the concrete through the series of actual institutes. The ideal element of Right—that which Vico called the “true (*verum*)”—is thus, according to this conception, imperfect standing alone, and should be integrated with the “certain (*certum*),” that is with the historical “position,” before Right can properly arise. Not without justice, observing such tendencies in modern idealistic philosophy of law, could an adversary of it, such as was Vanni, experience gratification from it, as with a partial agreement with the doctrines professed by him. “It is not then the positivists alone”—he exclaimed—“who affirm as the only true Right, positive Right!” And he adduced this argument in opposition to Petrone, who a little earlier, approximating much more closely to classical tradition, had vindicated the theoretical legitimacy of natural Right.

But very soon Petrone himself, resuming the discussion, declared that by natural Right should be understood “not a concrete and perfect right,” but only “a *principium cognoscendi* of just laws of conduct in the order of social life”; and afterwards came to abandon the antithesis between natural and positive Right, reducing it to that between justice and Right, and conceding to positivism that “the simple ideal concept of justice cannot count as Right in the rigorous sense of the word, independently of its objectification and of social sanction.” “Right,” he explained, “requires to have for its character objectivity, determined, formulated, and limited consistence, that is, exterior and positive determination. The essential pivot of the existence of Right is in the Thesis, in the “Satzung,”—is, that is, in its placing, in its “position”; without which, mere justice is the result, and justice not objectified;—amorphous and disarticulated justice, ideologic, subjective justice, and not Right properly so-called.” In such manner, and still without substantially changing his speculative attitude towards the problem, Petrone, in the particular question which now engages us, came to accept a solution analogous to that proposed by his adversaries.

It is right however, at this point, to say that in all these philosophical controversies the positivity of Right is always understood in a much more extensive sense than that used by practical lawyers who are not philosophers. For the lawyer, "positive Right" often means only the system in vigour in the State to which he belongs; whence, it follows, that the rules observed by other peoples and at other times would not be called positive, and much less still those which are peculiar to peoples and times very remote. Such restrictive use of the term is without doubt connected with that mental habit which Bacon has already well defined, when, to the faults characteristic of philosophers, he opposed those not less characteristic of jurists: "*Philosophi proponunt multa dictu pulchra, sed ab usu remota. Jurisconsulti autem suæ quisque patriæ legum, vel etiam Romanarum aut pontificiarum, placitis obnoxii et addicti, iudicio sincero non utuntur, sed tamquam e vinculis sermocinantur.*"¹ Indeed, nothing is more deeply opposed to a scientific comprehension of the phenomena of Right, than a one-sided attention to the institutions peculiar to a particular community at a certain moment in history; as if the same institutions were not subject to that law of relativity which governs equally all phenomena, and were capable of being considered as the exclusive source of authority. But with such an illusion we need not occupy ourselves; as it is here simply a question of a mere subjective illusion which dissolves in the very act of being presented; and not of a theoretically elaborated criterion, more or less capable of argumentative defence. On this point, all the schools of legal philosophy are and should be in agreement: that Right has everywhere a phenomenal or positive reality, inasmuch as it is produced and placed historically in every human society; whether or no it may have, besides that, another reality metempirical or purely ideal.

To resolve this latter, which is the real question, it is, however, necessary to pause for a short while to consider this point, which is commonly taken for granted, and is not always cleared up with exactness; it is necessary to ask oneself: When is Right really "positive"? How is it made complete, and in what does its "position" essentially consist?

The answer to such questions would be simple, if the rule of Right always grew up in an uniform manner, and if

¹ Bacon, *De dign. et augm. scientiarum*, L. VIIII. *De justitia universali sive de fontibus juris*. Proemium.

it were, in one and the same moment, conceived, formulated, and applied. But no one is ignorant that the coming into force of any rule whatever pre-supposes a very complicated process and often a very long one.

There are, among all Peoples, some fundamental convictions regarding modes and aims of conduct, which represent the common exigencies of human nature, displayed according to the degree of their development, and in relation to certain elements of outward fact. Such convictions determine generally all the forms under which life shews itself, and accordingly the juridical system among others, although they are not found written in the provisions of any code. Subordinate to these fundamental determinations, which have as their distinguishing characteristic a minimum of liability to change, juridical rules come to be elaborated and modified, together with the other rules of conduct. This process of elaboration is of its nature continuous, and takes place as much by collective and anonymous action as by specially constituted organs, which are of use only in so far as they are recognized and accepted by the preponderant social will (principle of "historical sufficient reason"). Sometimes the formulation of the rule precedes and determines its observance; at other times the contrary happens, and the rule is first observed and applied before it is expressed. In every case, the will which formulates itself in imperative terms represents the result and synthesis of many wills: the historical establishment of Right has always had root in the exigencies and aspirations of individual consciences. Not that these are constantly in unison with each other, as if simultaneously inspired by a transcendent existence, as the historical school supposed. The truth is rather that every subject helps in a certain manner, even though it may be in a minimum degree, in the production of Right, bringing his juridical appraisements to intervene in the social fabric along with those of others. That which we call the positive Right of a people is accurately the average expression of these evaluations, their equation in historical fact, always approximate, and therefore constantly in process of renewal.

If by positive Right we understand that which, at a given moment, effectively governs the life of a people, it is clear that we should understand it to include also that part which was never the object of any express establishment; whence it would be absurd to restrict, for example, the qualification

of "positive" to such Right only as is established by statute. Rather it may well be asked if all that which is established by statute is really positive Right. As regards which, it is as well to remember, in the first place, that in many statutes there are found elements which are not juridical; for example, historical narrations, affirmations of faith, financial calculations; and the distinction between "formal laws" and "material laws" based precisely on the recognized want, in some statutes, of a truly and specifically juridical content. Moreover, even if we take statutes containing rules of Right, it cannot really be said that they are always "positive," through the mere fact of their promulgation. They may have the extrinsic marks of validity; but we are obliged to have regard, according to the above criterion, to their effective application and applicability. Cases of statutes which have not been expressly abrogated, and have nevertheless remained and become a dead letter, occur frequently in the judicial history, even of highly advanced peoples; whether on account of the fact that contingencies of events prevent the possibility of putting certain rules into practice, or whether on account of the acceptance of new judicial principles in their place. Not, therefore, all statutes—as, on the other hand, not only statutes—really constitute the positive Right of a people.

Neither can the "positive" quality be made to depend on practice alone, even if constantly followed. The repetition of uniform acts is not enough in itself to produce a custom in the juridical sense. There are rules generally observed, often from time immemorial, and founded on an idea of utility and convenience, which nevertheless do not imply any obligation so far as the relations between individuals are concerned. There are also rules, which are reputed obligatory in the sense that their infraction would justify public blame, but which are all the same without any objective exigibility; whence the character of Right is denied them, and with reason.

In order that a positive Right may really exist it is not enough, therefore, to have the abstract expression of a juridical precept, nor, on the other hand, the observance of any usage whatsoever; but it is necessary that a *criterion of a juridical nature*—that is, one which establishes an obligation and a correlative claim—be inserted in the system regulating the conduct of a certain people, so that *its observance does not depend on the mere will* of him who is obliged, nor on the

mere force of him who may be interested. It is necessary, in other words, that a social organization should exist, capable of confirming the will of each, so far as it aims at the fulfilling of a rule of Right.

The critical moment at which the existence of a juridical positive rule—whether introduced by enactment or usage—is revealed and demonstrated in an obvious manner, is that of judicial application. This application gives in reality to the rule an actual and concrete efficiency; it takes it from its state of generic power and brings it in contact with living reality, which receives from it the definite imprint. One would be tempted—following a facile but superficial “realism”—to consider Right “positive” only at this its particular moment. But the truth is, that Right exists and works, of itself informing social relations, even before the judicial sentence and independently of it; the *possibility* of having a rule made effective by means of the organs of the State renders the rule itself “positive,” even if that possibility is not effectuated, and thus remains virtual only; as it must indeed remain in most cases, for it is beyond doubt that every rule would in fact be invalid, if it were not in most cases observed spontaneously.

An admission that the “positive character of a rule consists only in the act of its judicial application, would amount to confounding the function of the Judge with that of the legislator—practically annulling the latter, and taking away from the former its proper basis. The intrinsic logic of the judicial function in truth obliges us to conceive of Right as objectively anterior, that is as already declared to the Judge, we ought not to create it, but to recover it and declare its application in respect of each case. If the law does not yet exist (as, for instance, in the first stages of judicial evolution), or cannot be applied to the case in question, the Judge should refer himself to the logical organism of the system in vigour, regarding it as a single and comprehensive unit, at least virtually, of the entire scheme of things. Historical and psychological observation confirms the necessity of such reference to an universal maxim, which, even if discovered and formulated on the occasion of a particular judgment, does not, because of that, derive from it, but on the contrary ought to precede it, to invest it with intelligibility and authority.

That tendency is, therefore, to be combatted, which to-day manifests itself in the school of so-called “free Right;”

in accordance with the dictates of which it is thought proper to leave to the will of the Judge, not only the decision of each case, but also the determination of the rule to be followed in it. In such a system the essentials and the logical limits of the judicial function are entirely misconceived; limits which in the modern State perform also the function of a fundamental guarantee of liberty. The improper use of words should not lead one into error; the pretence of "liberty in the application of Right" would effectively constitute, besides a theoretical paralogism, a permanent danger to the legal liberty of the citizen, which has as one of its principal conditions the certainty of Right, and especially, the unshaken sovereignty of the law.

This, of course, is not equivalent to saying that the Judge ought to turn himself into a blind instrument for the mechanical application of Right. In so far as he should oppose himself to such a conception the *freirechtliche Bewegung* would be fully justified. Nobody can be ignorant that the interpretation of Right, and especially that which is required of the Judge, is a genuine and original consideration of it, that supposes a deep aptitude for it, while it profits by all suggestions evoked by the ever new relations which arise. This judicial interpretation is a subordinate element, but a necessary one for the full development of the system in force; it excites, like heaven, its ideal and hidden powers, and discovers often in ancient laws meanings which their authors could not have explored. But though the logical foundations of the system and the organic unity of its structure remain unchanged by the interpreter, still within these limits the system receives new and fruitful increases in the course of its application.

Thus by degrees the natural human vocation for Right becomes historically determined and verified; the common necessities, sunk so to speak in our spirit, are translated, in the words of Vico, into "maxims witnessed by Justice;" and the maxims formulated in universal categories descend to an infinite series of contingencies, they submit and adhere to the particular cases. The whole system regarded in its entirety does not admit of any sharp divisions, nor does it undergo change *ex abrupto*; but a continual organic process of elaboration permits of its progressive renewal, which can never be interrupted, unless by an interruption of life itself. It so happens that a juridical idea may have to be

defended for centuries, before finding its place among positive ordinances; whether that event happens by express determination, when the idea has acquired sufficient historical force, or whether it begins by informing, perhaps unnoticed, the practice through separate cases of its application.

Now, if the process which leads to the imparting of a "positive" quality to Right on the stage of historic fact is of this nature; if, dealing with such a thing as a process or an empirical turning point, it is not possible to establish *a priori* the moment at which a legal idea becomes positive, nor that in which it ceases to be such; to us it seems clear that the quality of "positiveness" cannot possibly be regarded as essential to or immanent in the idea itself, but should rather be regarded as an extrinsic and accidental element. The facts or the series of facts that render a juridical determination "positive," do not make it at the same time juridical; since this latter property is not historical, but purely logical, and in this sense is above the changes and lapse of time. What ever may be the degree of social force which sustains it—whether or no enduring for a certain predominant time, whether affirmed by some individual only or by many, a legal proposition retains its own characteristic meaning; that is, it remains a legal proposition; if not, then in order to discover in it such a character it is necessary first to make sure of the application which it may have had at some particular moment or other of history!

What are the logical elements that properly constitute the juridical character, has been incidentally mentioned already, and may here be briefly summed up.

Among the forms of evaluation and determination of conduct, there must necessarily be one which concerns the actions of a multiplicity of persons so far as they meet and intermingle with each other. In other words, a criterion must be established, according to which an objective scheme may be deduced—some system of reciprocal compatibility and accommodation between the persons concerned; without which no ethic would be possible, or at least satisfactory, since human conduct would remain undefined and amorphous in one of its most fundamental aspects. Right is precisely this criterion, which values and defines in an objective or correlative sense the conduct of several persons. It does not take into consideration the activities of anyone except in

so far as it has relations with the activities of others; it does not regulate the conduct of the individual *uti singulus*, but only of the *socius*. Every predicate that is juridical is, therefore, trans-subjective and two-sided, implying a condition of alterity, a limit and relation between a multiplicity of people. This relation, however various may be the contents of it, has always the formal consequence that what is recognized as permitted on one side cannot be prevented by the other. Legality is similarly an effective claim of respect, to which corresponds an analogous obligation; and upon this rigorous correspondence between the terms of the relation its legal nature depends.

Any proposition which satisfies this formula, that is, the existence of such an inter-subjective relation, has without doubt the character of Right. Whence results the identity, and, at the same time, the changeableness of Right; since infinite propositions are possible according to the same logical species, as history itself, in almost continuous examples, makes evident. But not all juridical propositions have been historically verified, and those which have been verified with one people, have not always been verified with others; those which ruled in a certain age frequently fell away in a following epoch. Positivity is then an episode that may take place, and will certainly take place, in respect of juridical ideas which so far have not been effected; while many which at present are in force will come to an end.

To consider as a right only what seems "positive" to us would lead us logically to deny the juridical character of all the systems that have not reached such an empirical phase, or that have passed it. For that matter (for instance) in so far as the Right created by Roman law has ceased to be "positive," so far would it have ceased to be Right! Again, the nature of juridical rules (for instance, projects of laws) that are being elaborated in place of, or in addition to those in force, would be misconceived; and they would be ascribed to some other indeterminate category, until the instant of their appearance in actual force. In short, one would arrive at the absurdity of making the intrinsic sense of a maxim depend upon the extrinsic and accidental fact of its approbation and observance.

Those who accept the doctrine of the essentially positive character of Right are accustomed to point out this characteristic as a criterion of distinction between Right and

morals. But it is exactly this application of the doctrine, which, if it were true, would have supreme importance, which shews instead its irremediable want of foundation. Because morals themselves have also a historical and positive existence; and the problem, whether they have this existence alone or have also a metempirical character, arises in their case not less than in that of Right. He who affirms—for example, with Ahrens—that morality is absolute and invariable, but Right relative to time and place, commits, in our opinion, a twofold error; since, on the one side, he forgets that the principle of historical relativeness is applicable to moral, in the same manner as to juridical, phenomenology, and, on the other hand, disregards the fact that a moral absolute is not possible without a corresponding juridical absolute.

That all Peoples have their own "positive morality" in harmony with their own system of Right, and therefore, subject to an analogous development, is a truth which stands in no need of demonstration, especially after modern investigations into this subject. In reality, both kinds of determination have a meeting ground, and are compounded into a concrete ethical organism or regulating system, which is precisely the product and the historical exponent of the predominating convictions regarding modes and ends of conduct. The rules of both the one and the other species have, however, differing characters, inasmuch as they correspond to the two fundamental points of view according to which conduct is capable of being regarded. Right concerns, as we have said, the objective ordering of activities, and affirms itself where a collision between the actions of several persons is possible, marking the limits of their respective effective claims. But morality furnishes a rule in another sense, and tends to resolve the clashing between two different actions which one and the same person can carry out. Moral precepts are therefore subjective or one-sided, since, even if they have also a relation to other persons, they really determine only the conduct of him who ought to execute them; while juridical precepts are essentially objective or two-sided, because they signify always a correlative determination of the conduct of a multiplicity of persons. From this different logical nature of the one and the other category, follows the difference which we find in their expressions and sanctions; that is, in the varying manner in which the juridical and the

moral rules make their force felt, even when it is in the same manner that they are recognized and observed. Such difference cannot, however, prevent us from recognizing that there is in every human society a morality in force, which reveals itself in custom, and is historical and relative, like the Right which springs from and is developed along with it.

No distinctive criterion is then afforded by the mere fact of "positiveness," unless from that we ascend to the intrinsic meaning of the rules set or followed. Considering this meaning, we perceive that Right and morality have, although each in its own way, a mode of existing—or rather of appearing—in the sphere of experience; but in themselves, as forms of evaluation of work, they are both ranked above this sphere, and denote a duty to be a deontological exigency. Thus, then, both morality and Right express, if at different visual angles, an ideal of conduct that can be violated physically, without on that account ceasing to have its value as ideal.

No one doubts that, in a given system, the legal rule remains such, whether in fact infringed by some or not. The transgression falls logically under the rule, and does not destroy it; right violated withdraws itself from the action of violence—Rosmini has well remarked—like an immortal existence, inaccessible to all material power, which does not succeed as much as in touching it. In this hyperphenomenal value resides properly the truth of Right, which, analogously to that of morality, does not depend on facts, but rather tends to impose itself on them; whence neither can it be limited by the institutions actually in vigour, of whatever kind they may be; rather it sets its affirmations naturally beyond these, and sometimes against them. This same positive Right, inasmuch as it represents a reality of fact, is subjected to an evaluation *sub specie juris*. that is. it is liable to be referred to a criterion of justice, independent of every historical sanction. This criterion persists in the human conscience, and is one and uniform in its principles, on which it proceeds gradually to unfold itself. Though the juridical vocation of the conscience is reflected in the institutions which succeed each other in history, still it is not exhausted. Nay, the development of these institutions would not be possible if no new Right could ever be opposed to that already established; that is, there would not exist that natural jurisdiction which the conscience exercises in an autonomous

fashion on the objects already contemplated by the judicial and positive arrangements, and, therefore, on those arrangements themselves.

The antithesis between the natural and the positive Right, between the *Phusei dikaion* and the *nomos* or *Theoei dikaion* on which the classical philosophy of Right is in all its developments concentrated, expresses exactly this fundamental law of our being, this necessity of a refraction of the absolute in the relative. It has been in vain attempted to eliminate the antithesis, dogmatically denying its first term, or ending in its confusion with the second. The exigency of natural Right persists, notwithstanding the denials of positivists and the attentuations of equivocal "historism;" it persists, in spite of the much more harmful errors of the very persons who advocate it with an inadequate apparatus or by improper methods. Natural Right exists, that is, it is valid, because the human being exists and must be reckoned with, whose inseparable attribute it is; and its determinations are drawn simply from the examination of human nature itself, which reason can perfect, bending back upon itself: "*ex ratiocinatione animi tranquilli*," to repeat the formula of Thomasius.

The dogma of the essential "positivity" of Right is thus dissolved by criticism. We see that "positivity" is nothing else than a transient and superficial image of a more profound truth. The analysis of the process which leads to the imparting on the stage of history of a "positive" quality to Right, obliging us as it does to recognize in the process itself only a "*consecutivum*"—a purely secondary result—in respect of the *idea* that is thus rendered positive, confirms in an indirect but undeniable manner, the legitimacy of the deduction of pure Right as an ideal conception.

GEORGE DEL VECCHIO.

DETECTION AND PROOF OF FORGERY.

By J. W. JOHNSON, F.C.A., M.P.P.

Detection and proof of forgery in handwriting are best accomplished by comparing the alleged forgery, say of a signature, with a number of signatures that are admittedly genuine. The handwriting of an individual is as much a part of his identity as are the features of his face, his voice, his walk and carriage. Without an effort that is strained and unnatural, and therefore easily detected, a man cannot counterfeit the features, the voice or walk and carriage of another. So it is with handwriting; the movement of the arm and fingers that produces the writing of an individual is as unconsciously performed as is the movement of the legs in walking; thus use breeds a habit that becomes so confirmed that the man's walk and handwriting are his alone and are so recognized.

When considering a case of alleged forgery, bear in mind the facts above stated and the principles they imply, and if you are accustomed to receive and deal with the correspondence of many people, you are competent to give valuable evidence in a Court of Justice on a charge of forgery. There are two things to do:

1st. Become familiar with the genuine signature as a whole and it will be in the mind, through the eye, as distinct as any other personal characteristic of the person could be, and wherever the signature is seen, on a cheque, on a draft, on a note, on a deed, on a mortgage or on a letter it will be recognized as the signature of the individual with scarcely the possibility of error.

2nd. Following the general comparisons it will be well to analyze and compare the letters forming the words and their connections and combinations, and what has been conviction as the result of the general comparison will, when taken with the analyses, become a moral certainty.



VISCOUNT HALDANE.
Lord Chancellor of England.

MESSAGE FROM KING GEORGE V.

The following message, brought by Lord Haldane from His Majesty King George V., was received with enthusiastic applause by the visiting members of the American Bar Association:

“I have given my Lord Chancellor permission to cross the sea, so that he may address the meeting at Montreal. I have asked him to convey from me to that great gathering of the lawyers of the United States and of Canada my best wishes for its success. I entertain the hope that the deliberations of the distinguished men of both countries who are to assemble at Montreal may add yet further to the esteem and good will which the people of the United States and of Canada and the United Kingdom have for each other.”

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HIGHER NATIONALITY.

A STUDY IN LAW AND ETHICS.

Annual address by Rt. Hon. Richard Burdon Haldane, Lord High Chancellor of Great Britain, at the meeting of the American Bar Association, at Montreal, Canada, September 1-3, 1913.

It is with genuine pleasure that I find myself among my fellow-lawyers of the New World. But my satisfaction is tempered by a sense of embarrassment. There is a multitude of topics on which it would be most natural that I should seek to touch. If, however, I am to use to any purpose the opportunity which you have accorded me, I must exclude all but one or two of them. For in an hour like this, as in most other times of endeavour, he who would accomplish anything must limit himself. What I have to say will therefore be confined to the suggestion of little more than a single thought, and to its development and illustration with materials that lie to hand. I wish to lay before you a result at which I have arrived after reflection, and to submit it for your consideration with such capacity as I possess.

For the occasion is as rare as it is important. Around me I see assembled some of the most distinguished figures in the public life of this Continent; men who throughout their careers have combined law with statesmanship, and who have exercised a potent influence in the fashioning of opinion and of policy. The law is indeed a calling notable for the individualities it has produced. Their production has counted for much in the past of the three nations that are represented at this meeting, and it means much for them to-day.

What one who finds himself face to face with this assemblage naturally thinks of is the future of these three nations;

a future that may depend largely on the influence of men with opportunities such as are ours. The United States and Canada and Great Britain together form a group which is unique; unique because of its common inheritance in traditions, in surroundings, and in ideals. And nowhere is the character of this common inheritance more apparent than in the region of jurisprudence. The lawyers of the three countries think for the most part alike. At no period has political divergence prevented this fact from being strikingly apparent. Where the letter of their law is different the spirit is yet the same, and it has been so always. As I speak of the historical tradition of our great calling, and of what appears likely to be its record in days to come, it seems to me that we who are here gathered may well proclaim, in the words of the Spartans, "We are what you were; we shall be what you are."

It is this identity of spirit, largely due to a past which the lawyers of the group have inherited jointly, that not only forms a bond of union, but furnishes them with an influence that can hardly be reproduced in other nations. I take my stand on facts which are beyond controversy, and seek to look ahead. I ask you to consider with me whether we, who have in days gone by moulded their laws, are not called on to try in days that lie in front to mould opinion in yet another form, and so encourage the nations of this group to develop and recognize a reliable character in the obligations they assume towards each other. For it may be that there are relations possible within such a group of nations as is ours that are not possible for nations more isolated from each other and lacking in our identity of history and spirit. Canada and Great Britain on the one hand and the United States on the other, with their common language, their common interests, and their common ends, form something resembling a single society. If there be such a society it may develop within itself a foundation for international faith of a kind that is new in the history of the world. Without interfering with the freedom of action of these great countries, or the independence of their constitutions, it may be possible to establish a true unison between sovereign states. This unison will doubtless, if it ever comes into complete being, have its witnesses in treaties and written agreements. But such documents can never of themselves constitute it. Its substance, if it is to

be realized, must be sought for deeper down in an intimate social life. I have never been without hope that the future development of the world may bring all the nations that compose it nearer together, so that they will progressively cease to desire to hold each other at arm's length. But such an approximation can only come about very gradually, if I read the signs of the times aright. It seems to me to be far less likely of definite realization than in the case of a group united by ties such as those of which I have spoken.

Well, the growth of such a future is at least conceivable. The substance of some of the things I am going to say about its conception, and about the way by which that conception may become real, is as old as Plato. Yet the principles and facts to which I shall have to refer appear to me to be often overlooked by those to whom they might well appear obvious. Perhaps the reason is the deadening effect of that conventional atmosphere out of which few men in public life succeed in completely escaping. We can best assist in the freshening of that atmosphere by omitting no opportunity of trying to think rightly, and thereby to contribute to the fashioning of a more hopeful and resolute kind of public opinion. For, as someone has said, "*L'opinion generale dirige l'autorite, quels qu'en soient les depositaires.*"

The chance of laying before such an audience as this what was in my mind made the invitation which came from the Bar Association and from the heads of our great profession, both in Canada and in the United States, a highly attractive one. But before I could accept it I had to obtain the permission of my Sovereign; for, as you know, the Lord Chancellor is also Custos Sigilli, the Keeper of that Great Seal under which alone supreme executive acts of the British Crown can be done. It is an instrument he must neither quit without special authority, nor carry out of the realm. The head of a predecessor of mine, Cardinal Wolsey, was in peril because he was so daring as to take the Great Seal across the water to Calais, when he ought instead to have asked his Sovereign, to put it into commission.

Well, the Clavis Regni was on the present occasion put safely into commission before I left, and I am privileged to be here with a comfortable constitutional conscience. But the King has done more than graciously approve of my leaving British shores. I am the bearer to you of a message from him which I will now read:

"I have given my Lord Chancellor permission to cross the seas, so that he may address the meeting at Montreal. I have asked him to convey from me to that great meeting of the lawyers of the United States and of Canada my best wishes for its success. I entertain the hope that the deliberations of the distinguished men of both countries who are to assemble at Montreal may add yet further to the esteem and goodwill which the people of the United States and of Canada and the United Kingdom have for each other."

The King's message forms a text for what I have to say, and, having conveyed that message to you, I propose in the first place to turn to the reasons which make me think that the class to which you and I belong has a peculiar and extensive responsibility as regards the future relations of the three countries. But these reasons turn on the position which courts of law hold in Anglo-Saxon constitutions, and before I enter on them I must recall to you the character of the tradition that tends to fashion a common mind in you and me as members of a profession that has exercised a profound influence on Anglo-Saxon society. It is not difficult in an assemblage of lawyers such as we are to realize the process by which our customary habits of thought have come into being and bind us together. The spirit of the jurisprudence which is ours, of the system which we apply to the regulation of human affairs in Canada, in the United States, and in Great Britain alike, is different from that which obtains in other countries. It is its very peculiarity that lends to it its potency, and it is worth while to make explicit what the spirit of our law really means for us.

I read the other day the reflections of a foreign thinker on what seemed to him the barbarism of the entire system of English jurisprudence, in its essence judge-made and not based on the scientific foundation of a code. I do not wonder at such reflections. There is a gulf fixed between the method of a code and such procedure as that of Chief Justice Holt in *Coggs v. Bernard*, of Chief Justice Pratt in *Armory v. Delmarie*, and of Lord Mansfield when he defined the count for money had and received. A stranger to the spirit of the law as it was evolved through centuries in England will always find its history a curious one. Looking first at the early English common law its most striking feature is the enormous extent to which its founders concerned themselves with remedies before settling the sub-

stantive rules for breach of which the remedies were required. Nowhere else, unless perhaps in the law of ancient Rome, do we see such a spectacle of legal writs making legal rights. Of the system of the common law there is a saying of Mr. Justice Wendell Holmes which is profoundly true: "The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intentions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics." As the distinguished writer whom I have quoted tells us, we cannot, without the closest application of the historical method, comprehend the genesis and evolution of the English common law. Its paradox is that in its beginnings the forms of action came before the substance. It is in the history of English remedies that we have to study the growth of rights. I recall a notable sentence in one of Sir Henry Maine's books. "So great," he declares, "is the ascendancy of the law of actions in the infancy of courts of justice, that substantive law has at first the look of being gradually secreted in the interstices of procedure." I will add to his observation this: That all our reforms notwithstanding, the dead hands of the old forms of action still rest firmly upon us. In logic the substantive conceptions ought of course to have preceded these forms. But the historical sequence has been different, for reasons with which every competent student of early English history is familiar. The phenomenon is no uncommon one. The time spirit and the spirit of logical form do not always, in a world where the contingent is ever obtruding itself, travel hand in hand. The germs of substantive law were indeed present as potential forces from the beginning, but they did not grow into life until later on. And therefore forms of action have thrust themselves forward with undue prominence. That is why the understanding of our law is, even for the practitioner of to-day, inseparable from knowledge of its history.

As with the common law, so it is with equity. To know the principles of equity is to know the history of the courts

in which it has been administered, and especially the history of the office which at present I chance myself to hold. Between law and equity there is no other true line of demarcation. The King was the fountain of justice. But to get justice at his hands it was necessary first of all to obtain the King's writ. As Bracton declared, "*non potest quis sine brevi agere.*" But the King could not personally look after the department where such writs were to be obtained. At the head of this, his chancery, he therefore placed a Chancellor, usually a Bishop, but sometimes an Archbishop, and even a Cardinal, for in those days the church had a grip which to a Lord Chancellor of the twentieth century is unfamiliar. At first the holder of the office was not a judge. But he was keeper of the King's conscience, and his business was to see that the King's subjects had remedies when he considered that they had suffered wrongs. Consequently he began to invent new writs, and finally to develop remedies which were not confined by the rigid precedents of the common law. Thus he soon became a Judge. When he found that he could not grant a common law writ he took to summoning people before him and to searching their consciences. He inquired, for instance, as to trusts which they were said to have undertaken, and as the result of his inquiries, rights and obligations, unknown to the common law were born in his court of conscience. You see at a glance how susceptible such a practice was of development into a complete system of equity. You would expect, moreover, to find that the ecclesiastical atmosphere in which my official predecessors lived would influence the forms in which they moulded their special system of jurisprudence. This did indeed happen, but even in those days the atmosphere was not merely ecclesiastical. For the Lord High Chancellor in the household of an early English monarch was the King's domestic chaplain, and as, unlike his fellow-servants in the household, the Lord High Steward and the Lord Great Chamberlain, he always possessed the by no means common advantage of being able to read and write, he acted as the King's political secretary. He used, it seems, in early days to live in the palace, and he had a regular daily allowance. From one of the records it appears that his wages were five shillings, a simnel cake, two seasoned simnels, one sextary of clear wine, one sextary of household wine, one large wax candle, and forty small pieces

of candle. In the time of Henry II. the modern treasury spirit appears to have begun to walk abroad, for in the records the allowance of five shillings appears as if subjected to a reduction. If he dined away from the palace, *si extra domun comederit*, and was thereby forced to provide extras, then indeed he got his five shillings. But if he dined at home, *intra domun*, he was not allowed more than three shillings and sixpence. The advantage of his position was, however, that, living in the palace, he was always at the King's ear. He kept the Great Seal through which all great acts of state were manifested. Indeed it was the custody of the Great Seal that made him Chancellor. Even to-day this is the constitutional usage. When I myself was made Lord Chancellor the appointment was effected, not by letters patent, nor by writing under the sign manual, nor even by words spoken, but by the Sovereign making a simple delivery of the Great Seal into my hands while I knelt before him at Buckingham Palace in the presence of the Privy Council.

The reign of Charles I. saw the last of the ecclesiastical Chancellors. The slight sketch of the earlier period which I have drawn shews that in these times there might well have developed a great divergence of equity from the common law, under the influence of the canon and Roman laws to which ecclesiastical chancellors would naturally turn. In the old courts of equity it was natural that a different atmosphere from that of the common law courts should be breathed. But with the gradual drawing together of the courts of law and equity under law chancellors the difference of atmosphere disappears, and we see the two systems becoming fused into one.

The moral of the whole story is the hopelessness of attempting to study Anglo-Saxon jurisprudence apart from the history of its growth and of the characters of the judges who created it. It is by no accident that among Anglo-Saxon lawyers the law does not assume the form of codes, but is largely judge-made. We have statutory codes for portions of the field which we have to cover. But these statutory codes come, not at the beginning, but at the end. For the most part the law has already been made by those who practise it before the codes embody it. Such codes with us arrive only with the close of the day, after its heat and burden have been borne, and when the journey is already near its end.

I have spoken of a spirit and of traditions which have been apparent in English law. But they have made their influence felt elsewhere. My judicial colleagues in the Province of Quebec administer a system which is partly embodied in a great modern code, and partly depends on old French law of the period of Louis XIV. They apply, moreover, a good deal of the public and commercial law of England. The relation of the code to these systems has given rise to some controversies. What I have gathered, however, when sitting in the Judicial Committee of the Privy Council, is that a spirit not very different from that of the English lawyers has prevailed in Quebec. The influence of the judges in moulding the law, and of legal opinion in fashioning the shape which it should take, seem to me to have been hardly less apparent in Quebec than elsewhere in Canada. Indeed, the several systems of our group of nations, however these systems have originated, everywhere shew a similar spirit, and disclose the power of our lawyers in creating and developing the law as well as in changing it; a power which has been more exercised outside the legislature than within it. It is surely because the lawyers of the New World have an influence so potent and so easily wielded that they have been able to use it copiously in a wider field of public affairs than that of mere jurisprudence. It is very striking to the observer to see how many of the names of those who have controlled the currents of public opinion in the United States and Canada alike have been the names of famous lawyers. I think this has been so partly because the tradition and spirit of the law were always what I have described and different from that on the Continent of Europe. But it has also been so because, in consequence of that tradition and spirit, the vocation of the lawyers has not, as on the continent of Europe, been that of a segregated profession of interpreters; but a vocation which has placed him at the very heart of affairs. In the United Kingdom this has happened in the same fashion, yet hardly to so great an extent, because there has been competition of other and powerful classes whose tradition has been to devote their lives to a parliamentary career. But in the case of all three nations it is profoundly true that, as was said by the present President of the United States in 1910, in an address delivered to this very Association, "the country must find lawyers of the right sort and the old

spirit to advise it, or it must stumble through a very chaos of blind experiment. It never," he went on to add, "needed lawyers who are also statesmen more than it needs them now; needs them in its Courts, in its legislatures, in its seats of executive authority; lawyers who can think in the terms of society itself."

This at least is evident that if you and I belong to a great calling it is a calling in which we have a great responsibility. We can do much to influence opinion, and the history of our law and the character of our tradition render it easy for us to attain to that unity in habit of thought and sentiment which is the first condition of combined action. That is why I do not hesitate to speak to you as I am doing.

And having said so much I now submit to you my second point. The law has grown by development through the influence of the opinion of society guided by its skilled advisers. But the law forms only a small part of the system of rules by which the conduct of the citizens of a state is regulated. Law, properly so called, whether civil or criminal, means essentially those rules of conduct which are expressly and publicly laid down by the sovereign will of the state and are enforced by the sanction of compulsion. Law, however, imports something more than this. As I have already remarked its full significance cannot be understood apart from the history and spirit of the nation whose law it is. Moreover, it has a real relation to the obligations even of conscience, as well as to something else which I shall presently refer to as the general will of society. In short, if its full significance is to be appreciated, larger conceptions than those of the mere lawyer are essential; conceptions which come to us from the moralist and the sociologist, and without which we cannot see fully how the genesis of law has come about. That is where writers like Bentham and Austin are deficient. One cannot read a great book like the "*Esprit des Lois*" without seeing that Montesquieu had a deeper insight than Bentham or Austin, and that he had already grasped a truth which, in Great Britain at all events, was to be forgotten for a time.

Besides the rules and sanctions which belong to law and legality, there are other rules with a different kind of sanction which also influence conduct. I have spoken of conscience, and conscience, in the strict sense of the word, has its own Court. But the tribunal of conscience is a private

one and its jurisdiction is limited to the individual whose conscience it is. The moral rules enjoined by the private conscience may be the very highest of all. But they are enforced only by an inward and private tribunal. Their sanction is subjective and not binding in the same way on all men. The very loftiness of the motive which makes a man love his neighbor more than himself, or sell all his goods in order that he may obey a great and inward call, renders that motive in the highest cases incapable of being made a rule of universal application in any positive form. And so it was that the foundation on which one of the greatest of modern moralists, Immanuel Kant, sought to base his ethical system, had to be revised by his successors. For it was found to reduce itself to little more than a negative and therefore barren obligation to act at all times from maxims fit for law universal; maxims which, because merely negative, turned out to be inadequate as guides through the field of daily conduct. In point of fact, that field is covered in the case of the citizen only to a small extent by law and legality on the one hand, and by the dictates of the individual conscience on the other. There is a more extensive system of guidance which regulates conduct and which differs from both in its character and sanction. It applies, like law, to all the members of a society alike without distinction of persons. It resembles the morality of conscience in that it is enforced by no legal compulsion. In the English language we have no name for it, and this is unfortunate, for the lack of a distinctive name has occasioned confusion both of thought and of expression. German writers have, however, marked out the system to which I refer and have given it the name of "Sittlichkeit." In his book "Der Zweck im Recht" Rudolph von Jhering, a famous professor at Gottingen, with whose figure I was familiar when I was a student there nearly forty years ago, pointed out, in the part which he devoted to the subject of "Sittlichkeit," that it was the merit of the German language to have been the only one to find a really distinctive and scientific expression for it. "Sittlichkeit" is the system of habitual or customary conduct, ethical rather than legal, which embraces all those obligations of the citizen which it is "bad form" or "not the thing" to disregard. Indeed, regard for these obligations is frequently enjoined merely by the social penalty of being "cut" or looked on askance.

And yet the system is so generally accepted and is held in so high regard that no one can venture to disregard it without in some way suffering at the hands of his neighbours for so doing. If a man maltreats his wife and children, or habitually jostles his fellow-citizen in the street, or does things flagrantly selfish or in bad taste, he is pretty sure to find himself in a minority and the worse off in the end. But not only does it not pay to do these things, but the decent man does not wish to do them. A feeling analogous to what arises from the dictates of his more private and individual conscience restrains him. He finds himself so restrained in the ordinary affairs of daily life. But he is guided in his conduct by no mere inward feeling, as in the case of conscience. Conscience and, for that matter, law overlap parts of the sphere of social obligation about which I am speaking. A rule of conduct may, indeed, appear in more than one sphere, and may consequently have a two-fold sanction. But the guide to which the citizen mostly looks is just the standard recognized by the community; a community made up mainly of those fellow-citizens whose good opinion he respects and desires to have. He has everywhere round him an object lesson in the conduct of decent people towards each other and towards the community to which they belong. Without such conduct and the restraints which it imposes there could be no tolerable social life, and real freedom from interference would not be enjoyed. It is the instinctive sense of what to do and what not to do in daily life and behaviour that is the source of liberty and ease. And it is this instinctive sense of obligation that is the chief foundation of society. Its reality takes objective shape and displays itself in family life and in our other civic and social institutions. It is not limited to any one form, and it is capable of manifesting itself in new forms and of developing and changing old forms. Indeed, the civic community is more than a political fabric. It includes all the social institutions in and by which the individual life is influenced, such as are the family, the school, the church, the legislature and the executive. None of these can subsist in isolation from the rest; together they and other institutions of the kind form a single organic whole; the whole which is known as the nation. The spirit and habit of life which this organic entirety inspires and compels are what, for my present purpose, I mean by "Sittlichkeit."

"Sitte" is the German for customs, and "Sittlichkeit" implies custom and a habit of mind and action. It also implies a little more. Fichte¹ defines it in words which are worth quoting and which I will put into English: "What, to begin with," he says, "does 'Sitte' signify, and in what sense do we use the word? It means for us, and means in every accurate reference we make to it, those principles of conduct which regulate people in their relations to each other, and which have become matter of habit and second nature at the stage of culture reached, and of which therefore we are not explicitly conscious. Principles, we call them, because we do not refer to the sort of conduct that is casual or is determined on casual grounds, but to the hidden and uniform ground of action which we assume to be present in the man whose action is not deflected and from which we can pretty certainly predict what he will do. Principles, we say, which have become a second nature and of which we are not explicitly conscious. We thus exclude all impulses and motives based on free individual choice, the inward aspect of 'Sittlichkeit,' that is to say morality, and also the outward side, or law, alike. For what a man has first to reflect over and then freely to resolve is not for him a habit in conduct, and in so far as habit in conduct is associated with a particular age it is regarded as the unconscious instrument of the time spirit."

The system of ethical habit in a community is of a dominating character, for the decision and influence of the whole community is embodied in that social habit. Because such conduct is systematic and covers the whole of the field of society the individual will is closely related by it to the will and spirit of the community. And out of this relation arises the power of adequately controlling the conduct of the individual. If this power fails or becomes weak the community degenerates and may fall to pieces. Different nations excel in their "Sittlichkeit" in different fashions. The spirit of the community and its ideals may vary greatly. There may be a low level of "Sittlichkeit," and we have the spectacle of nations which have even degenerated in this respect. It may possibly conflict with law and morality, as in the case of the duel. But when its level is high in a nation we admire the system, for we see it not only guiding a

¹ *Grundsuge des Gegenwartigen Zeitalters*. Werke, Band 7, p. 214.

people and binding them together for national effort, but affording the most real freedom of thought and action for those who in daily life habitually act in harmony with the general will.

Thus we have in the case of a community, be it the city or be it the state, an illustration of a sanction which is sufficient to compel observance of a rule without any question of the application of force. This kind of sanction may be of a highly compelling quality, and it often extends so far as to make the individual prefer the good of the community to his own. The development of many of our social institutions, of our hospitals, of our universities, and of other establishments of the kind, shews the extent to which it reaches and is powerful. But it has yet higher forms in which it approaches very nearly to the level of the obligation of conscience, although it is distinct from that form of obligation. I will try to make clear what I mean by illustrations. A man may be impelled to action of a high order by his sense of unity with the society to which he belongs; action of which, from the civil standpoint, all approve. What he does in such a case is natural to him, and is done without thought of reward or punishment, but it has reference to standards of conduct set up by society and accepted just because society has set them up. There is a poem by the late Sir Alfred Lyall which exemplifies the high level that may be reached in such conduct. The poem is called "Theology in Extremis," and it describes the feelings of an Englishman who had been taken prisoner by Mahometan rebels in the Indian mutiny. He is face to face with a cruel death. They offer him his life if he will repeat something from the Koran. If he complies no one is likely ever to hear of it, and he will be free to return to England and to the woman he loves. Moreover, and here is the real point, he is not a believer in Christianity, so that it is no question of denying his Saviour. What ought he to do? Deliverance is easy and the relief and advantage would be unspeakably great. But he does not really hesitate, and every shadow of doubt disappears when he hears his fellow-prisoner, a half-caste, pattering eagerly the words demanded. He himself has no hope of heaven and he loves life:

"Yet for the honour of English race
May I not live and endure disgrace.
Ay, but the word if I could have said it,
I by no terrors of hell perplex.
Hard to be silent and have no credit
From man in this world, or reward in the next,
None to bear witness and reckon the cost
Of the name that is saved by the life that is lost.
I must begone to the crowd untold
Of men by the cause which they served unknown,
Who moulder in myriad graves of old,
Never a story and never a stone
Tells of the martyrs who die like me
Just for the pride of the old countree."

I will take another example, this time from the literature of ancient Greece.

In one of the shortest but not least impressive of his dialogues, the "Crito," Plato tells us of the character of Socrates, not as a philosopher, but as a good citizen. He has been unjustly condemned by the Athenians as an enemy to the good of the state. Crito comes to him in prison to persuade him to escape. He urges on him many arguments, his duty to his children included. But Socrates refuses. He chooses to follow, not what anyone in the crowd might do, but the example which the ideal citizen should set. It would be a breach of his duty to fly from the judgment duly passed in the Athens to which he belongs, even though he thinks the decree should have been different. For it is the decree of the established justice of his city state. He will not "play truant." He hears the words, "Listen, Socrates, to us who have brought you up," and in reply he refuses to go away in these final sentences: "This is the voice which I seem to hear murmuring in my ears, like the sound of the flute in the ears of the mystic; that voice, I say, is murmuring in my ears, and prevents me from hearing any other. And I know that anything more which you may say will be vain."

Why do men of this stamp act so, it may be when leading the battle line, it may be at critical moments of quite other kinds? It is, I think, because they are more than mere individuals. Individual they are, but completely real, even as individual, only in their relation to organic and social wholes in which they are members, such as the family, the city, the state. There is in every truly organized community a common will which is willed by those who compose that community and who in so willing are more than isolated men and women. It is not, indeed, as unrelated atoms that they

have lived. They have grown, from the receptive days of childhood up to maturity, in an atmosphere of example and general custom, and their lives have widened out from one little world to other and higher worlds, so that, through occupying successive stations in life, they more and more come to make their own the life of the social whole in which they move and have their being. They cannot mark off or define their own individualities without reference to the individualities of others. And so they unconsciously find themselves as in truth pulse-beats of the whole system, and themselves the whole system. It is real in them and they in it. They are real only because they are social. The notion that the individual is the highest form of reality, and that the relationship of individuals is one of mere contract, the notion of Hobbes and of Bentham and of Austin, turns out to be quite inadequate. Even of an everyday contract, that of marriage, it has been well said that it is a contract to pass out of the sphere of contract, and that it is possible only because the contracting parties are already beyond and above that sphere. As a modern writer, F. H. Bradley of Oxford, to whose investigations in these regions we owe much, has finely said: "The moral organism is not a mere animal organism. In the latter the member is not aware of itself as such, while in the former it knows itself and therefore knows the whole in itself. The narrow external function of the man is not the whole man. He has a life which we cannot see with our eyes, and there is no duty so mean that it is not the realization of this, and knowable as such. What counts is not the visible outer work so much as the spirit in which it is done. The breadth of my life is not measured by the multitude of my pursuits, nor the space I take up amongst other men; but by the fulness of the whole life which I know as mine. It is true that less now depends on each of us as this or that man; it is not true that our individuality is therefore lessened, that therefore we have less in us."

There is, according to this view, a general will with which the will of the good citizen is in accord. He feels that he would despise himself were his private will not in harmony with it. The notion of the reality of such a will is no new one. It is as old as the Greeks, for whom the moral order and the city state were closely related, and we find it in modern books in which we do not look for it. Jean Jacques

Rousseau is probably best known to the world by the famous words in which he begins the first chapter of the "Social Contract:" "Man is born free, and everywhere he is in chains. Those who think themselves to be the masters of others cease not to be greater slaves than the people they govern." He goes on in the next paragraph to tell us that if he were only to consider force and the effects of it, he would say that if a nation was constrained to obey and did obey it did well, but that whatever it could throw off its yoke and did throw it off it acted better. His words, written in 1762, became a text for the pioneers of the French Revolution. But they would have done well to read further into the book. As Rousseau goes on we find a different conception. He passes from considering the fiction of a social contract to a discussion of the power over the individual of the general will, by virtue of which a people becomes a people. This general will, the *Volonté Générale*, he distinguishes from the *Volonté de Tous*, which is a mere numerical sum of individual wills. These particular wills do not rise above themselves. The general will, on the other hand, represents what is greater than the individual volition of those who compose the society of which it is the will. On occasions this higher will is more apparent than at other times. But it may, if there is social slackness, be difficult to distinguish from a mere aggregate of voices, from the will of a mob. What is interesting is that Rousseau, so often associated with doctrine of quite another kind, should finally recognize the bond of a general will as what really holds the community together. For him, as for those who have had a yet clearer grasp of the principle, in willing the general will we not only realize our true selves, but we may rise above our ordinary habit of mind. We may reach heights which we could not reach, or which at all events most of us could not reach, in isolation. There are few observers who have not been impressed with the wonderful unity and concentration of purpose which an entire nation may display—above all in a period of crisis. We see it in time of war, when a nation is fighting for its life or for a great cause. We have seen it in Japan and we have seen it still more recently among the people of the Balkan Peninsula. We have marvelled at the illustrations with which history abounds of the general will rising to heights of which but few of the individual citizens in whom it is embodied have ever before been conscious even in their dreams.

In his life of Themistocles Plutarch tells us how even in time of peace the leader of the Athenian people could fashion them into an undivided community and inspire them to rise above themselves. It was before the Persians had actually threatened to invade Attica that Themistocles foresaw what would come. Greece could not raise armies comparable in numbers to those of the Persian Kings. But he told his people that the oracle had spoken thus: "When all things else are taken within the boundary of Cecrops and the covert of divine Cithaeron, Zeus grants to Athena that the wall of wood alone shall remain uncaptured, which shall help thee and thy children." The Athenian citizens were accustomed in each year to divide among themselves the revenue of their silver mines at Laurium. Themistocles had the daring, so Plutarch tells us, to come forward and boldly propose that the usual distribution should cease, and that they should let him spend the money for them in building a hundred ships. The citizens rose to his lead, the ships were built, and with them the Greeks were able at a later date to win against Xerxes the great sea-fight at Salamis, and to defeat an invasion by the hosts of Persia which, had it succeeded, might have changed the course of modern as well as ancient history.

By such leadership it is that a common ideal can be made to penetrate the soul of a people and to take complete possession of it. The ideal may be very high, or it may be of so ordinary a kind that we are not conscious of it without the effort of reflection. But when it is there it influences and guides daily conduct. Such idealism passes beyond the sphere of law, which provides only what is necessary for mutual protection and liberty of just action. It falls short, on the other hand, in quality of the dictates of what Kant called the categorical imperative that rules the private and individual conscience, but that alone; an imperative which therefore gives insufficient guidance for ordinary and daily social life. Yet the ideal of which I speak is not the less binding, and it is recognized as so binding that the conduct of all good men conforms to it.

Thus we find within the single state the evidence of a sanction which is less than legal but more than merely moral, and which is sufficient, in the vast majority of the events of daily life, to secure observance of general standards of conduct without any question of resort to force. If this is so

within a nation, can it be so as between nations? This brings me at once to my third point. Can nations form a group or community among themselves within which a habit of looking to common ideals may grow up sufficiently strong to develop a general will, and to make the binding power of these ideals a reliable sanction for their obligations to each other,

There is, I think, nothing in the real nature of nationality that precludes such a possibility. A famous student of history has bequeathed to us a definition of nationality which is worth attention. I refer to Ernest Renan, of whom George Meredith once said to me, while the great French critic was still living, that there was more in his head than in any other head in Europe. Renan tells us that: "Man is enslaved neither by his race, nor by his language, nor by his religion, nor by the course of rivers, nor by the direction of mountain ranges. A great aggregation of men, sane of mind and warm of heart, creates a moral consciousness which is called a nation." Another acute critic of life, Matthew Arnold, citing one still greater than himself, draws what is in effect a deduction from the same proposition. "Let us," he says,² "conceive of the whole group of civilized nations as being, for intellectual and spiritual purposes, one great confederation, bound to a joint action and working towards a common result; a confederation whose members have a due knowledge both of the past, out of which they all proceed, and of each other. This was the ideal of Goethe, and it is an ideal which will impose itself upon the thoughts of our modern societies more and more."

But while I admire the faith of Renan and Arnold and Goethe in what they all three believed to be the future of humanity, there is a long road yet to be traveled before what they hoped for can be fully accomplished. Grotius concludes his great book on War and Peace with a noble prayer: "May God write," he said, "these lessons—He who alone can—on the hearts of all those who have the affairs of Christendom in their hands. And may he give to those persons a mind fitted to understand and to respect rights, human and divine, and lead them to recollect always that the ministration committed to them is no less than this, that they are the governors of man, a creature most dear to God."

The prayer of Grotius has not yet been fulfilled, nor do

² Preface to the Poems of Wordsworth.

recent events point to a fulfilment as being near. The world is probably a long way off from the abolition of armaments and the peril of war. For habits of mind which can be sufficiently strong with a single people can hardly be as strong between nations. There does not exist the same extent of common interest, of common purpose, and of common tradition. And yet the tendency, even as between nations that stand in no special relation to each other, to develop such a habit of mind is in our time becoming recognizable. There are signs that the best people in the best nations are ceasing to wish to live in a world of mere claims, and to proclaim on every occasion "Our country, right or wrong." There is growing up a disposition to believe that it is good, not only for all men but for all nations, to consider their neighbours' point of view as well as their own. There is apparent at least a tendency to seek for a higher standard of ideals in international relations. The barbarism which once looked to conquest and the waging of successful war as the main object of statesmanship seems as though it were passing away. There have been established rules of international law which already govern the conduct of war itself, and are generally observed as binding by all civilized people, with the result that the cruelties of war have been lessened. If practice falls short of theory, at last there is to-day little effective challenge of the broad principle that a nation has as regards its neighbours duties as well as rights. It is this spirit that may develop as time goes on into a full international "Sittlichkeit." But such development is certainly still easier and more hopeful in the case of nations with some special relation than it is within a mere aggregate of nations. At times a common interest among nations with special relations of the kind I am thinking of gives birth to a social habit of thought and action which in the end crystalizes into a treaty; a treaty which in its turn stimulates the process that gave it birth. We see this in the case of Germany and Austria, and in that of France and Russia. Sometimes a friendly relationship grows up without crystalizing into a general treaty. Such has been the case between my own country and France. We have no convention excepting one confined to the settlement of old controversies over specific subjects; a convention which has nothing to do with war. None the less, since in that convention there was embodied the testimony of willingness to

give as well as to take, and to be mutually understanding and helpful, there has arisen between France and England a new kind of feeling which forms a real tie. It is still young and it may stand still or diminish. But equally well it may advance and grow, and it is earnestly to be hoped that it will do so.

Recent events in Europe and the way in which the great Powers have worked together to preserve the peace of Europe, as if forming one community, point to the ethical possibilities of the group system as deserving of close study by both statesmen and students. The "Sittlichkeit" which can develop itself between the peoples of even a loosely-connected group seems to promise a sanction for international obligation which has not hitherto, so far as I know, attracted attention in connection with international law. But if the group system deserves attention in the cases referred to, how much more does it call for attention in another and far more striking case!

In the year which is approaching a century will have passed since the United States and the people of Canada and Great Britain terminated a great war by the Peace of Ghent. On both sides the combatants felt that war to be unnatural and one that should never have commenced. And now we have lived for nearly a hundred years, not only in peace, but also, I think, in process of coming to a deepening and yet more complete understanding of each other, and to the possession of common ends and ideals; ends and ideals which are natural to the Anglo-Saxon group and to that group alone. It seems to me that within our community there is growing an ethical feeling which has something approaching to the binding quality of which I have been speaking. Men may violate the obligations which that feeling suggests, but by a vast number of our respective citizens it would not be accounted decent to do so. For the nations in such a group as ours to violate these obligations would be as if respectable neighbours should fall to blows because of a difference of opinion. We may disagree on specific points, and we probably shall, but the differences should be settled in the spirit and in the manner in which citizens usually settle their differences. The new attitude which is growing up has changed many things, and made much that once happened no longer likely to recur. I am concerned when I come across things that were written about America by British novelists only fifty years ago, and I doubt not that there are some things in the American literature of days gone

past which many here would wish to have been without. But now that sort of writing is happily over, and we are realizing more and more the significance of our joint tradition and of the common interests which are ours. It is a splendid example to the world that Canada and the United States should have nearly four thousand miles of frontier practically unfortified. As an ex-war minister, who knows what a saving in unproductive expenditure this means, I fervently hope that it may never be otherwise.

But it is not merely in external results that the pursuit of a growing common ideal shews itself when such an ideal is really in men's minds. It transforms the spirit in which we regard each other, and it gives us faith in each other:—

“Why, what but faith, do we abhor
And idolize each other for—
Faith in our evil or our good,
Which is or is not understood
Aright by those we love or those
We hate, thence called our friends or foes.”

I think that for the future of the relations between the United States on the one hand, and Canada and Great Britain on the other, those who are assembled in this great meeting have their own special responsibility. We who are the lawyers of the New World and of the old mother country possess, as I have said to you, a tradition which is distinctive and peculiarly our own. We have been taught to look on our system of justice not as something that waits to be embodied in abstract codes before it can be said to exist, but as what we ourselves are progressively and co-operatively evolving. And our power of influence is not confined to the securing of municipal justice. We play a large part in public affairs, and we influence our fellow-men in questions which go far beyond the province of the law, and which extend in the relations of society to that “Sittlichkeit” of which I have spoken. In this region we exert much control. If, then, there is to grow up among the nations of our group, and between that group and the rest of civilization, a yet further development of “Sittlichkeit,” has not our profession special opportunities of influencing opinion which are coupled with a deep responsibility? To me, when I look to the history of our calling in the three countries, it seems that the answer to this question requires no argument and admits of no controversy. It is our very habit of regarding the law and the wider rules of conduct which lie beyond the law as something to be moulded

afresh as society develops, and to be moulded best if we co-operate steadily, that gives us an influence perhaps greater than is strictly ours; an influence which may in affairs of the state be potentially exercised for good or for evil.

This, then, is why, as a lawyer speaking to lawyers, I have a strong sense of responsibility in being present here to-day, and why I believe that many of you share my feeling. A movement is in progress which we, by the character of our calling as judges and as advocates, have special opportunities to further. The sphere of our action has its limits, but at least it is given to us as a body to be the counsellors of our fellow-citizens in public and in private life alike. I have before my mind the words which I have already quoted of the present President of the United States, when he spoke of "lawyers who can think in the terms of society itself." And I believe that if, in the language of yet another President, in the famous words of Lincoln, we as a body in our minds and hearts "highly resolve" to work for the general recognition by society of the binding character of international duties and rights as they arise within the Anglo-Saxon group, we shall not resolve in vain. A mere common desire may seem an intangible instrument, and yet, intangible as it is, it may be enough to form the beginning of what in the end can make the whole difference. Ideas have hands and feet, and the ideas of a congress, such as this, may affect public opinion deeply. It is easy to fail to realize how much an occasion like the assemblage in Montreal of the American Bar Association, on the eve of a great international centenary, can be made to mean, and it is easy to let such an occasion pass with a too timid modesty. Should we let it pass now, I think a real opportunity for doing good will just thereby have been missed by you and me. We need say nothing; we need pass no cut and dried resolution. It is the spirit and not the letter that is the one thing needful.

I do not apologize for having trespassed on the time and attention of this remarkable meeting for so long, or for urging what may seem to belong more to ethics than to law. We are bound to search after fresh principles if we desire to find firm foundations for a progressive practical life. It is the absence of a clear conception of principle that occasions, some at least, of the obscurities and perplexities that beset us in the giving of counsel and in following it. On the other hand, it is futile to delay action until reflection has cleared up all

our difficulties. If we would learn to swim we must first enter the water. We must not refuse to begin our journey until the whole of the road we may have to travel lies mapped out before us. A great thinker declared that it is not philosophy which first gives us the truth that lies to hand around us, and that mankind has not to wait for philosophy in order to be conscious of this truth. Plain John Locke put the same thing in more homely words when he said that "God has not been so sparing to men to make them two-legged creatures, and left it to Aristotle to make them national." Yet the reflective spirit does help, not by furnishing us with dogmas or final conclusions, or even with lines of action that are always definite, but by the insight which it gives; an insight that develops in us what Plato called the "synoptic mind;" the mind that enables us to see things steadily as well as to see them whole.

And now I have expressed what I had in my mind. Your welcome to me has been indeed a generous one, and I shall carry the memory of it back over the Atlantic. But the occasion has seemed to me significant of something beyond even its splendid hospitality. I have interpreted it, and I think not wrongly, as the symbol of a desire that extends beyond the limits of this assemblage. I mean the desire that we should steadily direct our thoughts to how we can draw into closest harmony the nations of a race in which all of us have a common pride. If that be now a far-spread inclination, then indeed may the people of three great countries say to Jerusalem "Thou shalt be built," and to the temple "Thy foundation shall be laid."

EDITORIAL.

LORD HALDANE'S ADDRESS.

A rather stout, well-built gentleman about five feet ten, slightly stooped, clean-shaven and with a pleasant, smiling countenance, is Viscount Haldane, Lord High Chancellor, and one of the biggest men in Britain at the present day. Such is the description of Lord Haldane given by one of the Montreal daily papers at the time of his arrival in that city preparatory to delivering the annual address, published in this issue; before the American Bar Association. It was not with Lord Haldane's personal appearance, however, that those who were assembled to hear the annual address were greatly concerned, but with Lord Haldane, the scholar, philosopher, diplomat, and statesman, the man who is a real figure among the great ones in the world's political arena.

It is seldom indeed that such a large number of big, brainy men are found gathered together as was the case at the meeting of the American Bar Association; not only men of national, but of world-wide reputation, great and brilliant as they undoubtedly were, the Lord Chancellor of England stood head and shoulders above them all. This opinion must of necessity been forced upon the most skeptical of the visitors when listening to the brilliant address on "Higher Nationality," delivered by Lord Haldane.

The ordinary politician is, as a rule, like a weather-vane, carried away by every breath of popular opinion. The average statesman attempts to put into practice the accepted tenets of his day and generation, but Lord Haldane is not a politician, is greater than the average statesman, for he has been able to seize upon the spirit of the age, that "Zeitgeist" of the Germans, by which is meant all that is greatest and noblest in one's preconceived but often inarticulate ideals.

The address itself was delivered without stay or hesitation, in the voice of the cultivated English gentleman—in print it is literature, and epoch-making in its importance to the nations most vitally concerned, and worthy of the theme, worthy of the occasion, and worthy of the Lord Chancellor of England.

After Lord Haldane's address a resolution, presented by Mr. Hampton Carter, was unanimously passed expressing deep appreciation of the address and thanking the Lord Chancellor for coming over from England. Mr. Carter, in

the course of his remarks, said: "We applaud the spirit of the address. I take it that it means that every nation shall act like a gentleman, and the counsels of the world shall be controlled by the gentleman-like nations." (Laughter).

Lord Haldane was also informed that he had been elected an honorary member of the American Bar Association, and he acknowledged the honour in terms of warm appreciation and gratitude.

LORD HALDANE ON THE NAVY.

"It would be a great source of relief to Great Britain if Canada could assist in the defence of our common interests.

"The burden of defending the Empire is becoming very heavy for our little islands.

"We will defend the Empire as long as you want us to, but any additional strength you can give us will be one of the greatest guarantees of peace we can have.

"Our policy is to keep out foreign entanglements, and the more you can come into our councils and take your parts in shaping our foreign policy, the more happy we shall feel."

—THE RT. HON. VISCOUNT HALDANE,

Lord High Chancellor of Great Britain.

Ex-President Taft on the best way to become acquainted:—

Mr. Taft was at his best.

"Ladies who have been embraced so often," he said, smiling his famous smile; and after further references to the same ladies, turned to enumerate his reasons for feeling so at home in Canada.

"During my absence, but within hearing distance," he said, "I had the honour to figure prominently when some people were obsessed. You cannot make acquaintance with people until you are abused in their hearing and commended to their approval or disapproval by graceful cartoons." (Laughter).

"For that reason I feel at home in both countries." (Prolonged laughter and cheers). "Through accident, fortuitous circumstance, or by a calamity when I lost the Presidency in

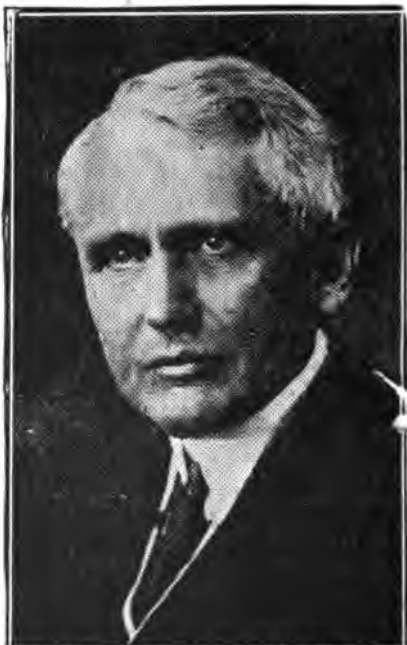
**PROMINENT FIGURES AT THE MEETING OF THE
AMERICAN BAR ASSOCIATION.**



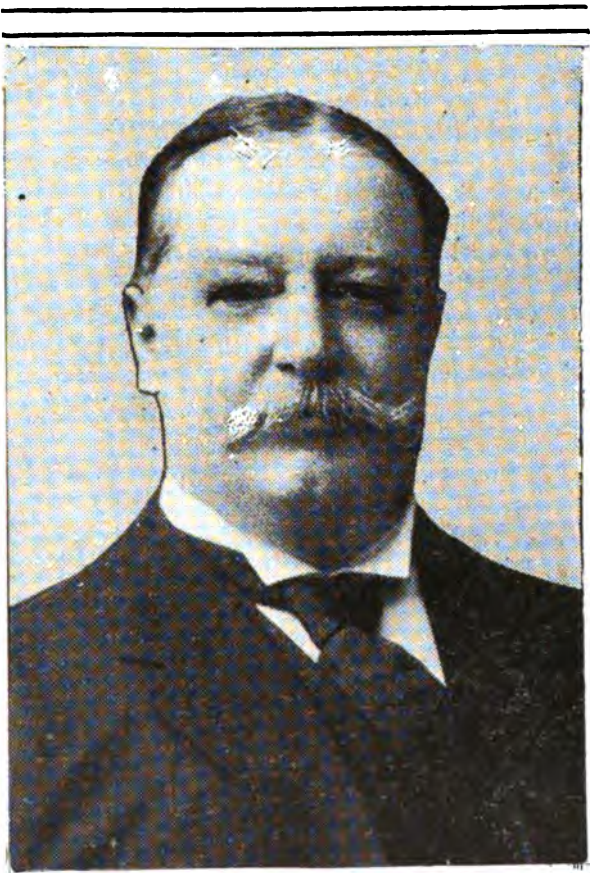
EDWARD DOUGLAS WHITE.
Chief Justice of the United States Supreme Court.



HON. JOSEPH CHOATE.



HON. FRANK B. KELLOGG,
President of the American Bar Association.



EX-PRESIDENT, W. H. TAFT.

America I came over to Canada to get another." (Another outburst of laughter and applause).

McGill University did her part in conferring on the distinguished members of the American Bar Association and their guests by enrolling the following among the names of her distinguished sons:—Lord Chancellor Richard Burdon Haldane, of Great Britain; Chief Justice Edward Douglas White, of the United States; Prime Minister Robert L. Borden, of Canada; Maitre F. Labori, Batonnier de l'Ordre des Avocats a la Cour de Paris, France; Hon. William H. Taft, ex-President of the United States; Hon. Charles J. Doherty, Minister of Justice and Attorney-General of Canada; Hon. Joseph H. Choate, ex-Ambassador from the United States to Great Britain; Hon. Elihu Root, United States Senator from New York; Hon. Frank B. Kellogg, President of the American Bar Association.

The following gentlemen were made honorary members of the American Bar Association:—Premier Borden was placed at the head of the list of honorary members, followed by Sir Wilfrid Laurier, Sir Francois Langelier, Lieut.-Governor of Quebec; Hon. C. J. Doherty, Sir Charles Fitzpatrick, Hon. Horace Archambault, Sir Charles Peers Davidson, Chief Justice of Montreal; Prof. Michel Mathien, Dean Waldron, of the McGill Law Faculty; Mayor Lavelle, J. E. Martin, K.C., Batonnier of the Quebec Bar, and R. C. Smith, K.C., who had been so instrumental in inducing the American Bar Association to meet in Montreal. Outside of Canadians the only choice of an honorary member of the association was that of Maitre Gustave Labori, leader of the French Bar.

AMERICAN BAR ASSOCIATION.

The closing function of the Bar Association meeting, namely, the banquet, was a very brilliant affair, some twelve hundred members of the legal profession sitting down to the tables, and marked the close of the most memorable period in the history of Canada and the United States, as well as

Great Britain, for undoubtedly the meeting of the Association in Montreal has done much to bring about a closer union of the great English-speaking peoples.

The Honourable Joseph Choate presided in the absence of the Honourable Elihu Root, and maintained his international reputation as a host and after-dinner speaker.

Brilliant addresses were made by Maitre Labori, Batonnier of the French Bar; Ex-President Taft, President Kellogg, the Minister of Justice, and others among the distinguished gentlemen present at the banquet, bringing to an end one of the most enjoyable gatherings ever held in the history of the Dominion.

One of the sayings of Joseph Choate: "During the long years I have been in England I sometimes doubted whether I was an Englishman or an American, until someone trod on the toes of the American eagle, and then I helped him scream. Well, when I am in Canada I am a Canadian, and I will always be a true son of McGill."

Chief Justice White, when introducing Lord Haldane, did so in a particularly gracious and graceful manner:—"The Lord High Chancellor," Chief Justice White said. "The occupant of the greatest judicial office," (Applause) then a pause, "or as great," (Low applause and laughter), "has crossed the sea at the invitation of America to honour and bless us with his presence. The very mention of his presence introduces him to everybody familiar with the English tongue. It introduces that which cannot be introduced because it introduces itself. But nowhere on the face of the globe could he find a warmer feeling for the office he fills." (Applause). "It is my inestimable privilege," Chief Justice White concluded, addressing the Lord Chancellor, "to introduce to you my brethren of the American Bar." Then the whole house rose and demonstrated its appreciation of a happy, generous tribute.

A telegram was received from the Duke and Duchess of Connaught expressing their regret that their absence in England prevented them from being present.

The following are expressions of opinion of some of the great English dailies of the international importance of the address of the Lord Chancellor read at the meeting of the Bar Association:—

London, Tuesday, Sept. 2.—The "*Daily Telegraph*," in an editorial on Lord Haldane's address to the American Bar Association at Montreal, says:—

"It is an utterance which cannot but profoundly impress the whole body of the most powerful, politically and socially, of all professions, and the historian may some day look upon it as one of the chief events that led to the founding of a new and beneficent relationship between three great peoples."

The *London Times* says: "It is not too much to say that the address was worthy of the occasion. It was not a mere graceful exposition of complimentary commonplaces. Lord Haldane has done honour to his audience by his elevating theme and by submitting weighty considerations which are a real contribution to the solution of one of the great world problems. A notable authoritative is the inheritance by the English-speaking races of certain traditions as to the conduct of life, private and public. They have, with endless divers details, the same ethical standards and ideals. In the orderly life of a city their discipline relies on obedience to law and trusts in the efficacy of long and well-tried institutions. These habits, this temperament and creed, are theirs, whether they dwell on this side of the Atlantic or the other, and they are the foundations upon which those who hope for the future may build with assurance."

The *Daily News* says: "A year or two ago an attempt was made to effect a permanent arbitration treaty between this country and the United States. It failed for reasons which we regret; but peace between the English-speaking races rests on a surer basis than any arbitration treaty. It is founded on that common conscience to which Lord Haldane referred yesterday, and there are abundant signs to-day that the example which the Anglo-Saxon race has given to the world will bear fruit in still wider spheres. If the democracies of Europe are true to themselves the abolition of armaments will not be so remote a dream as Lord Haldane seems to suppose."

PROOF BY ORDEALS AMONG THE ROMANS.

[Apropos of the proof by ordeals dealt with at p. 113 *supra*, which prevailed among the ancient Hindus, we find the following prevailed among the Romans. Ed.]

The supernatural was introduced in all trials and served to cover up all injustice. Both the people and judges were possessed of the same ignorance and passions as if mankind could be wicked only when uneducated. To inquests and investigation founded on reason, judiciary contest was substituted. Resort was also had to proofs (ordalies) by fire, boiling water and cold water.

In the first of these proofs the accused, in order to demonstrate his innocence, was obliged to carry a red hot iron bar in his hand for a given distance.¹ In the second, the accused was forced to withdraw a ring from the bottom of a recipient filled with boiling water; while in the third he was thrown into water with his arms and legs tied. If innocent he sank to the bottom; otherwise his body floated on the surface.²

It must be said that all the procedures were not so barbarous. In some instances the pleaders were asked to eat a certain amount of bread and cheese placed on the altar. Nothing abnormal transpired if the accused was in the right, but the guilty vomited the repast with severe convulsions. It was at this epoch that the "preliminary question" was put in practice, and resulted in the conviction of a most innocent person if not mentally strong and to save a guilty one if mentally well equipped.

In the cadaveric phenomenon known by the term of *cruentation*, one perceived a manifest proof of divine interference. King James of Scotland, in his work on Demonology, published in 1597, says that after a secret assassination, if the cadaver of the victim is once touched by the murderer, the blood will gush forth in order to call divine vengeance upon the criminal. The proof was carried out as follows: The suspected murderer was placed at a certain distance from the victim, the body being naked and lying on

¹ See p. 115 *supra*.

² Cf. p. 115 *supra*.

its back. He next walked around the body two or three times and then touched the wounds very lightly with his hands. If, during these manœuvres, a flow of blood took place, the unfortunate person was convicted of murder. Should the contrary happen, then other proofs were brought into play.

This absurd practice was very extensively resorted to in England and Scotland, much less so in France where, however, we find an example of this kind in the full glow of the XVII. century. This affair, recorded by Ranchin, took place on May 3, 1639, in the little hamlet of Mas d'Azil. Upon several other occasions physicians discussed the value of this procedure. In 1594, Labavius in *De cruentatione cadaverorum*, Blancus in 1547, in *Tractatus de incidiis homicidii*, raised some objections on the subject but did not dare formally condemn it, while Michel Albertus, who published his *De hemorrhagiis mortuorum et jure cruentationis* as late as 1726, gives us to understand that in the XVIII. century, cruentation was still resorted to as a judiciary proof.—*Journal of Cr. L. and Cr.*

BOMBARDMENT OF RESIDENTIAL DISTRICTS.

BY PERCY BORDWELL, PH.D.

*Professor of Law, State University of Iowa.**Author of Treatise on 'The Law of War Between Belligerents.'*

The recent protest of Italy against the bombardment of the residential sections of Scutari by the Montenegrins has called general attention to a situation not unfamiliar to students of international law. One of the greatest advancements in modern warfare has been the elimination of many of those hardships which down to the peace of Westphalia in 1648 were the normal lot of noncombatants. Enlightened and efficient commanders, like Henry V. and Gustavus Adolphus, enforced standards of conduct which compare not unfavourably with those of modern times, but these men were exceptions, and in general there was little respect shewn either for private property or the home.

The period following the peace of Westphalia was a period of advance in military science, and much of the improvement in the conduct of warfare which Vattel noticed something over a hundred years later was due to the enlightened self-interest of the combatants themselves. Pillage is not conducive to discipline, nor is it an effective means of living off the country, and none saw this more clearly than the best generals of this period. But it was not only the self-interest of the belligerents that led to the amelioration of the condition of non-combatants. In 1625 Grotius had written his work on the Law of War and Peace, in which he had drawn his illustrations from the best practice and precept of Greece and Rome, and it made a distinct impression. The great Gustavus is said to have slept with a copy of it under his pillow, and although it could do little to check the barbarity of the Thirty Years War, the conditions for its good influence, being felt, were more favourable in the less passionate dynastic wars which followed. Vattel was the most influential of Grotius's successors. Writing in 1758 of the warfare of his time, he could say: "It is against one sovereign that another makes war, and not against the quiet subjects."¹

¹ Book III, chap. IX, § 167.

The Revolutionary and Napoleonic Wars marked somewhat of a reaction in the treatment of noncombatants, but the long period of peace which followed, the industrial revolution which resulted from the great inventions, and the spread of the doctrines of free trade and the brotherhood of man gave rise to dreams of a perpetual peace, and, when war actually came, to substantial modification of some of its rules. By the Declaration of Paris of 1856 privateering was abolished, and the principle that "free ships make free goods" established. This was followed by the Red Cross Convention of 1864 for the better care of the sick and wounded. In 1874 the first official attempt to draw up an international war code was made in the Declaration of Brussels. This failed of ratification through the opposition of Great Britain, but it served as the basis of the Regulations Respecting the Laws and Customs of War on Land adopted at the Peace Conference of 1899, which, as modified in some details by the second Peace Conference, form the bulk of our present code for land warfare.

The Hague Regulations forbid the bombardment of undefended towns; require that the commander of an attacking force, before commencing a bombardment, except in case of an assault, to do all he can to warn the authorities; direct that all necessary steps be taken to spare as far as possible the buildings devoted to religion, art, science, and charity, historic monuments, hospitals, and places where the sick and wounded are collected, which should be marked by some special sign; and prohibit the pillage of a town or place even when taken by assault.

The principles of these regulations were applied as far as conditions would permit to bombardments by naval forces by the second Peace Conference. The prohibition against bombarding undefended towns in the Naval Convention is not extended to military works, military or naval establishments, depots of arms or war materials, workshops, or plants, which could be utilized for the needs of the hostile fleet or army or ships of war in the harbour. In such a case the commander must take all due measures in order that the town may suffer as little harm as possible. Undefended towns may also be bombarded by naval forces, if the local authorities, on a formal summons being made to them, decline to comply with requisitions for provisions or supplies necessary for the immediate use of the naval force before the place in question. But

the bombardment of an undefended town by naval forces for the non-payment of money contribution is forbidden. Provision is also made that the signs used to indicate buildings devoted to religion, art, etc., shall consist of large stiff rectangular panels divided diagonally into two-colored triangular portions, the upper portion black, the lower portion white. In neither the Regulations nor the Naval Convention is anything said of the bombardment of the residential sections of defended towns. This is not because the matter has been overlooked by international conferences. The town of Antwerp petitioned the Brussels Conference of 1874 to adopt the principle that when a fortified town was bombarded the fire of the artillery should be directed solely against the forts, and not against private houses belonging to inoffensive citizens. The subject was not one on which there was likely to be general agreement, and as the object of the Conference was to crystalize the rules on which there was general agreement, rather than to settle controverted points, the committee which considered the petition placed it on record, but held out what comfort it might in the declaration of the general principles of the immunity of noncombatants and of respect for private property; voiced the hope that these principles would in the future bring about a realization of the desire of the citizens of Antwerp; and expressed confidence that every commander of civilized armies "would always consider it a sacred duty to employ every means in his power, in the case of a siege of a fortified town, to cause private property belonging to inoffensive citizens to be respected as far as local circumstances and the necessities of war will admit." "Local circumstances and the necessities of war" may cover a multitude of sins, and it is not likely that a commander bent on bombarding the residential section of a town would find this expression of confidence a serious check on his actions, but it may well cause a commander who would otherwise be inclined to take action of this kind, to think twice before taking it.

The hope of the committee has not been realized in any international agreement, although the provision in the Naval Convention that when a naval force destroys military supplies or establishments in an undefended town it shall do as little damage as possible, leans in that direction. Nor has it been realized in international practice. Leaving out of consideration the cases where the injury to private homes has been un-

¹ Parl. Papers. 1875, Misc. No. 1, p. 285.

avoidable or accidental, the number of cases where the resident portions of besieged towns have been deliberately bombarded in recent wars is not inconsiderable. It seems to have been part of the deliberate policy of the Germans in the Franco-German War. When Strasburg surrendered, "448 private houses had been destroyed completely, nearly 3,000 (out of a total of 5,150) were more or less injured, 1,700 civilians had been killed or wounded, and 10,000 persons were made homeless. The total damage done to the city was estimated at nearly £8,000,000."³

The practice is objected to on principle, on the ground that it is an attempt to bring pressure to bear on the other belligerents through the suffering and fears of noncombatants. G. F. de Martens is authority for the statement that during our Revolutionary War, Great Britain laid down the following proposition as a recognized rule of war: "When, in war, one is not able to destroy the adverse party or to lead him to reason without reducing his country to distress, it is permitted to carry distress into his country."⁴ Whether any such rule was ever formally enunciated by Great Britain, there was much in her conduct of the war, as for instance the raids by Benedict Arnold, to give colour to de Marten's statement.

General Sherman wrote to General Halleck in a similar strain from Savannah, December 24, 1864. He said: "I attach more importance to these deep incisions into the enemy's country, because this war differs from European wars in this particular,—we are not only fighting hostile armies, but a hostile people, and must make old and young, rich and poor, feel the hard hand of war, as well as their organized armies."⁵ And so, General Sheridan: "I do not hold war to mean simply that lines of men shall engage each other in battle, and material interests be ignored. This is but a duel, in which one combatant seeks the other's life; war means much more, and is far worse than this. Those who rest at home in peace and plenty see but little of the horrors attending such a duel, and even grow indifferent to them as the struggle goes on, contenting themselves with encouraging all who are able-bodied to enlist in the cause to fill up the shattered ranks as death thins them. It is another matter, however, when privation and suffering are brought to their own doors. Then

³ Spaight, *War Rights on Land*, pp. 161 *et seq.*

⁴ *Precis*, Bk. VIII. chap. IV, § 280.

⁵ *Rebellion Records*, series IV., vol. pp. 1094 *et seq.*

the case appears much graver, for the loss of property weighs heavy with the most of mankind, heavier often than the sacrifices made on the field of battle. Death is popularly considered the maximum of punishment in war, but it is not; reduction to poverty brings prayers for peace more surely and more quickly than does the destruction of human life, as the selfishness of man has demonstrated in more than one great conflict."⁶

Apparently neither General Sherman nor General Sheridan would see much that was objectionable on principle in the bombardment of the residential districts of besieged towns, but the greatness of their names must not blind us to the substantial progress that has been made in the conduct of warfare since they fought. The improved treatment of prisoners of war and of the sick and wounded since the Civil War refute the heresy that war cannot be refined. No such declaration as that attributed to Great Britain in the Revolutionary War would be tolerated in civilized warfare to-day, and it is not likely that either General Sherman or General Sheridan would have gone to the extremes that their words indicate. They were refuting a doctrine that would make war a duel between the military and naval forces of the two belligerents, and this was a great service.

The doctrine that they were combating has as its text the famous *dictum* of Rousseau, that war "is not a relation of man to man, but a relation of state to state, in which individuals are enemies only accidentally, not as men, nor even as citizens, but as soldiers; not as members of the country, but as its defenders."⁷ This doctrine has been used, on the one hand, to stamp as illegal the spontaneous uprisings of the population in occupied territory, and, on the other, to condemn the capture of private property at sea. Each of these matters should be considered on its own merits. It is not axiomatic that no pressure should be brought to bear on the other belligerent save through his armed forces. If effective pressure can be brought to bear upon him through an attack on his commerce, there are strong reasons for allowing the attack to be made. "It takes no lives, sheds no blood, imperils no households; has its field on the ocean, which is a common highway; and deals only with persons and property voluntarily embarked in the chances of war, for the purpose

⁶ Sheridan's Memoirs, vol. I, p. 486.

⁷ Du Contrat Social, L. I. chap. IV.

of gain, and with the protection of insurance."⁸ The danger to commerce in war has also been one of the powerful preventives of war. To prejudice such a question by a catch phrase such as that of Rousseau would be mischievous.

Equally mischievous would it be to condemn spontaneous uprisings in occupied territory on any such *a priori* grounds. At the Brussels Conference the smaller powers bitterly resented the attempt of the great military powers to incorporate into the text of the Declaration language making such uprisings illegal. They felt that their very life was at stake. General Sherman and General Sheridan did a useful service, therefore, in combating a mischievous theory, and their words must be read in the light of that fact.

About as helpful a generalization as can be made to test the rightfulness of conduct in warfare is that comparatively useless injury is to be condemned. Not vengeance on the enemy, but advantage to one's self, is the end to be kept in view. And the advantage should be weighed in the balance with the injury that would accompany it. Tested by this principle, is the bombardment of residential sections of besieged towns justified? It may well be doubted. It is said that the inhabitants of Strasburg were in perfect accord with the commander, and that if in their opinion he erred at all it was in capitulating prematurely.⁹

Probably most of the injuries to private residences from bombardments in recent wars have been unavoidable or accidental, due to the fact that the town was practically a walled camp. The tendency to-day is to build fortifications at some distance from the place they are to protect. This is likely to lead to the elimination of the unavoidable and accidental injuries to private residences from bombardments, and to make apparent the intentional character of any such injuries in the future. This, it is believed, will be an effective cause in the practical elimination of the bombardment of residential districts. Though Italy's protest be in advance of the usage of the recent past, it is in line with modern progress, and will perhaps serve as a fresh instance of the progressive character of the law of war.

PERCY BORDWELL.

⁸ Dana's Wheaton, p. 401.

⁹ Spaight, p. 164.

WARFARE UNDER THE SEA.

The perfecting of submarines goes steadily forward. The larger craft of this type are now armed. Each year shews an increased cruising radius, both on the surface and submerged; and it is thought that submarines should now be able to cross the Atlantic or cruise in the West Indies under their own power. They may also be able to handle mines now that they can remain several hours under water and can be submerged to a depth of 200 feet with a full crew on board.

The importance of this type of vessel and the unsatisfactory nature of earlier experiments has been commented on recently by the New Orleans Picayune as follows:

“Twenty years ago and more the people of the United States read Jules Verne’s story, ‘Twenty Thousand Leagues under the Sea,’ and believed that it would lead to some great change in naval warfare.

“There was an idea that submarine iron ships would be made that would not only be entirely safe and be navigated under water to any destination desired, but hostile ships would be blown up, torpedoed, and dynamited before it was known that an enemy was near.

“It is true that the submarine for war purposes has been made, but is a very unsafe contrivance, and there seems to be no assurance that when it once dives under water that it will ever come to the surface again. And although every naval nation has some, it does not appear that the war submarine ever accomplished any useful purpose or did any service in the defence of the nation to which it belongs.

“Although the idea of submarine attack has not been entirely abandoned far more attention is being given to aerial warfare, which, however, is not destined to bring any reliable results, and for war on the sea the submarine will finally accomplish something practical.

“But in order to reach such results it will be necessary to make the submarines both safe and manageable. There must be no difficulty in accomplishing the dive and resurrection acts with certainty, and in being able to keep the vessel under water for any time necessary, with entire comfort to all on board. There must not only be condensed air stored up in reservoirs, but there must be chemical means

to generate at need the oxygen and nitrogen required to furnish our respiration medium.

"These remarks are suggested in connection with the announcement that Russia is about to build a submarine cruiser of 5,400 tons displacement and to be fitted for considerable voyages under the sea. It is to be nearly ten times as big as our 500-ton submarine, and if it should possess some of the qualities and capacities of Verne's fictitious vessel it will be able to work a revolution in naval warfare.

"Whenever it shall be possible to sail under a ship's bottom and attach dynamite bombs to her keel, unknown to those on board, or to ram and torpedo them from below, the shock being the first intimation of the presence of an enemy, naval warfare will be attended with vastly more risks than at present, and a few submarine cruisers will be able to meet in a most formidable manner the greatest surface war fleets."

REVOCATION OF SHARES OF RESIDUE.

It is clear that, if a residuary estate is left to several named persons as tenants in common, and one or more of those persons predecease the testator, his share or their shares cannot successfully be claimed by the other residuary legatees. If they could be, the survivors would get different shares to what the testator bequeathed to them, and it is merely a guess to say that if he had thought that any of the named residuary legatees would die, he would have intended the others to take their shares. If such is the intention, it is quite easy to provide for their so taking by leaving the residue to such of them A., B., C., and D., as shall survive the testator, and if more than one in equal shares. A different question, however, arises where by an act of the testator some of the persons named are deprived of their shares. Such is the case of *Re Whiting; Ormond v. De Launay* (108 L. T. Rep. 629; (1913) W. N. 124), where in his will a testator directed his residue to be divided among forty-six named persons, and by a codicil he revoked the shares of two of those named persons, and after certain pecuniary bequests

confirmed his will. It was naturally argued that there was an intestacy as to the two shares. Mr. Justice Joyce felt no doubt, however, that the testator did not intend those two shares to be undisposed of, and laid great stress on the fact that the testator had expressly confirmed his will as altered, the effect of such confirmation being that the will, with the alterations made by the codicil, must be treated as made over again at the date of the codicil: (see *Re Fraser*, 91 L. T. Rep. 48; (1904) 1 Ch. 726). If the will had been made over again, with the alterations made by the codicil, the two names would have been simply struck out, and so the learned Judge held that the names must be treated as struck out and the residue must be divided amongst the other residuary legatees.

THE EXECUTION OF DEEDS.

The Court of Appeal in the recent case of *Re Seymour; Fielding v. Seymour* (108 L. T. Rep. 549; (1913) 1 Ch. 475) decided an important point on the law of deeds, holding that the acknowledgment by a lady of a deed purporting to have been executed under a power of attorney given by her amounted to a redelivery of the instrument as her deed. It is proposed in this article to investigate the meaning of the formalities in vogue for executing deeds and to inquire into the law touching this subject so that the significance of the recent case may be the better appreciated.

When a person after signing a deed goes through the apparently empty formality of placing his finger on the seal (generally a small circular piece of red paper stuck on to the document) and repeats the words dictated to him, "I deliver this as my act and deed," he little appreciates the significance of the words he uses. Very often, indeed, in practice, this small formality is dispensed with, the signing both by the person executing and the witness to his signature being deemed the important part of the execution ceremony. Yet the cabalistic words mentioned above have their meaning—a fact which will be fully appreciated upon a perusal of the judgments of the Lords Justices in the recent case.

Questions concerning the valid execution of deeds necessarily involve further questions of the essential characteristics of a valid deed. A deed is a legal institution of ancient origin, and definitions of deeds abound in ancient legal textbooks. Thus, various definitions are to be found in such books as Sheppard's Touchstone, Termes De La Ley, and the old Digests. But these definitions are anything but satisfactory. This is due, no doubt, largely to the fact that circumstances have altered. Thus, at one time few of the parties to a deed could write their names, and signing and even attestation was consequently little in vogue; sealing by the executing party being better fitted to the habits and capabilities of the public in general: (see per Chief Justice Holt in *R. v. Goddard*, 3 Salk. 171; *Cherry v. Heming*, 4 Ex. 631, at p. 636). Again, the transmutation of property was anciently more frequently evidenced by the giving of physical possession than it is now. Paper has largely taken the place of parchment—a fact due to improved methods of manufacture

rendering the article more durable than was formerly the case.

The ancient definitions of deeds lay much weight upon the necessity of parchment as a ground for a valid deed. It is said that an eccentric person who had perused an ancient text-book and had there learnt that two of the essentials of a valid deed were, first, that there should be writing, and, secondly, that the writing should be on parchment, conceived the idea of having the terms of the document inscribed on the skin of his back—an operation which was subsequently successfully carried out. Whether he submitted to the painful process of having hot sealing wax placed upon him is not known. But his legal advisers were able to persuade him to abandon his scheme by impressing on him the necessity for delivery to validate the document (a matter which he had overlooked) and to adopt the less sensational course of having the document drawn up in the usual way. Thus an interesting point in the law of evidence remains undecided—viz., whether, in the circumstances, the Court would have required production of the original or would have allowed secondary evidence of its contents to have been given in its place.

Lord Coke enumerates no less than ten essentials to a valid deed: (Co. Litt. 35*b*). But some of his essentials concern the subject-matter of the transaction rather than the requirements of a valid deed or of its due and proper execution. He mentions, however, the necessity for writing on parchment or paper, and the necessities of sealing and delivery, and in another passage (Co. Litt. 171*b*) he says that a deed "signifieth in the common law an instrument consisting of three things, viz., writing, sealing, and delivery, comprehending a bargain or contract between party and party, man or woman."

A striking feature of the old definitions of deeds is the weight placed on their feature as evidence of a contract. Little or nothing is said of their aspect as grants of interests in property. "A deed," said Chief Justice Bovill, referring to these definitions in *Reg. v. Morton* (28 L. T. Rep. 452; L. Rep. 2 C. C. R. 22, at p. 27), "is described as being something in the nature of a contract. But the term is clearly not confined to contracts. A charter of feoffment, for instance, is a deed; so is a gift or grant, a power of attorney, a release, or a disclaimer. I would go further and say that

any instrument delivered as a deed, and which either itself passes an interest, or property, or is in affirmance or confirmation of something whereby an interest or property passes. is a deed."

A document is not a deed merely because it is sealed. Many kinds of documents are made under seal and yet are not deeds. As instances of such, probates of wills, certificates of magistrates, and awards may be mentioned: (see *Reg. v. Morton, sup.*; *Chanter v. Johnson*, 14 M. & W. 408, at p. 411, per Baron Parke). Yet sealing is one of the essential attributes of a deed. It is more essential to a valid deed from one point of view than signature. Signature by the executing party is in theory of law unnecessary: (*R. v. Goddard, sup.*; *Cromwell v. Grunsden*, 2 Salk. 462).

Here we may notice a controversy which has from time to time been raised whether a deed duly sealed and delivered, but not signed, is valid in cases where the Statute of Frauds requires a transaction to be evidenced by a document signed by the person to be charged. The view expressed by Barons Parke, Alderson, and Rolfe in *Cherry v. Heming* (4 Ex. 631, at p. 636) is no doubt the correct one—namely, that the statute only struck at parol agreements and transactions, and not at agreements and transactions evidenced by the most solemn form of document known to the law. Consequently where a deed has been executed by sealing and delivery the Statute of Frauds does not apply.

Attestation by witnesses stands in much the same position as regards the validity of a deed *quā* deed, as does the signature by the executing party. In other words, attestation is in theory unnecessary: (see *Garrett v. Lister*, 1661, 1 Lev. 25). But both are desirable as working for efficacy. Just as the efficacy of a legal document is secured by the fullness and clearness of its terms, so also is the efficacy of a deed, as an item of evidence—as a proving medium, to use an unconventional term—secured by the readiness with which its authenticity can be established. In practice, signing by the executing party and attestation by a witness or witnesses is almost universally adopted as a custom of expediency. There are, of course, numerous occasions where such formalities are made necessary by statute; and other occasions will occur to the reader where signing and attestation are necessary, such, *e.g.*, where the document exercises a power, formalities for

the exercise of which have been prescribed by the donor of the power.

There can be no doubt but that delivery is by far the most important part of the formalities observed in executing a deed. Yet it is the one part upon which least stress is usually made in practice. In the words of Mr. Justice Keating in *Tupper v. Foulkes* (9 C. B. N. S. 797, at p. 803) the operative part of the ceremony is the delivery. "Where a contract," said Baron Martin in *Xenos v. Wickham* (14 C. B. N. S. 435, at p. 473), "is to be by deed, there must be delivery to perfect it. This is a positive absolute rule of the common law, which nothing but an Act of Parliament can alter, and which, in my judgment, ought not to be frittered away." The reason why delivery holds in law such an important place in the formalities attending the execution of a deed is no doubt due to the fact that it is the overt act which most unequivocally evidences the intention of the party delivering it to adopt the document as of binding force. The whole significance of the act of executing a deed is that the person executing it deliberately adopts it as binding upon him. By the outward act of delivery all question of intention to the contrary is placed beyond doubt. Intention, of course, is the foundation of the whole matter.

There are some interesting authorities upon the question what amounts to the delivery of a deed. "No particular technical form of words or acts is necessary to render an instrument the deed of the party sealing it," said Mr. Justice Blackburn in *Xenos v. Wickham* (16 L. T. Rep. 800; L. Rep. 2 H. L. 296, at p. 312). "The mere affixing the seal does not render it a deed; but as soon as there are acts or words sufficient to shew that it is intended by the party to execute it as his deed presently binding on him, it is sufficient. The most apt and expressive mode of indicating such an intention is to hand it over saying, 'I deliver this as my deed,' but any other words or acts that sufficiently shew that it was intended to be finally executed will do as well.

In *Stanton v. Chamberlain* (Owen, 95) an action of debt was brought on a bond, and the defendant raised the plea *non est factum*—in other words, that he had not executed it. The jury found that the defendant sealed the bond and cast it on the table, and the plaintiff came and took it up and carried it away without saying anything. The question raised was whether this amounted to a delivery of the bond. The

Judges resolved that if the jury had found that the defendant had sealed the bond and cast it on the table towards the plaintiff, to the intent that the plaintiff should take it as his deed, and the plaintiff had taken the bond and went away, that would have been a good delivery. And the same would have been the case had the plaintiff, after sealing it and casting it on the table, taken it up and gone away with it at the command or with the consent of the defendant. But inasmuch as the jury had found that the defendant had only sealed it and cast it on the table, and the plaintiff took it and went away with it, the Court held that there had not been a sufficient delivery because it might have been that the defendant sealed the document intending to reserve it to himself until other things had been agreed. The report continues: "But it was said that it might be accounted to be defendant's deed because it is found that he sealed it, and cast it on the table, and the plaintiff took it, &c., and it is not found that the defendant said anything, and therefore, because he did not say anything, it will amount to his consent *nam qui tacet consentire videtur*." This presumably was counsel's argument. The report concludes "But to this it was answered, that it is not found that the defendant was present when the plaintiff took it, and if the defendant had sealed, and went away, and then the plaintiff came and took it away, then clearly it is not the deed of the defendant."

The last-mentioned case admirably illustrates the whole principle underlying the law's necessity for delivery. Notwithstanding the fact that it was decided so long ago as the year 1587, it may be said to be the leading case on the law of delivery of deeds. There are other cases much to the same effect. They go to shew that some act of consent on the part of the person setting up a plea of *non est factum* suffices to make a delivery valid. In *R. v. Longnor* (1833, 4 B. & Ad. 647) an indenture had been prepared for binding a boy apprentice. The apprentice and his father, both being unable to write, procured a third person to write their names opposite two of the seals. The document was not read over to them, but the boy immediately afterwards took it to the master and left it with him, afterwards stating that when he did so, he considered himself bound. The boy entered the master's service under the indenture. The Court held that the indenture was sufficiently executed and delivered.

In passing, it may be observed that it is well established that the mere fact that a deed is retained by the executing party does not of itself prevent the Court holding the execution of the deed to have been perfected by the delivery by that party: (see *Xenos v. Wickham*, 16 L. T. Rep. 800; L. Rep. 2 H. L. 296).

Sometimes delivery is merely confirmatory. That is to say the act of delivery, or the conduct which is taken to amount to delivery, is not intimately associated with the other parts of the ceremony of execution, but follows perhaps at some distance of time. This is sometimes called redelivery. It occurs where there has been some defect in the original execution so that a party is not bound by the provisions of the document. By his subsequent act of redelivery he adopts the document as his deed and thereby becomes bound by it. Redelivery may therefore be defined as an acknowledgment made subsequently to the purported execution of a document purporting to be the deed of the person making such acknowledgment that the document is a deed of that person, and binds him according to its tenor: (see *Tupper v. Foulkes*, 9 C. B. N. S. 797; *Hudson v. Revett*, 5 Bing. 368). Like the question of delivery, the question of redelivery is an overt act from which intention is presumed. But in both cases the question of intention is a question of fact.

In the recent case, mentioned in the opening lines of this article, the material facts were as follows: A lady desired to make a gift of certain chattels to her daughter who resided with her, and she gave instructions that a deed should be prepared. This was done, and the document was executed for her by her attorney. Subsequently, in 1898, the document was brought by her legal adviser and read over to her, and it was arranged that she should send him the original inventory of the chattels and that he should keep it with the document. The inventory was accordingly afterwards sent by her to him inside a wrapper on which she had written some words to the effect that the chattels were then the property of the daughter. The power of attorney was not in the possession of her legal adviser, nor had it been prepared by him. Subsequently the house where the mother and daughter resided was sold, and most of the chattels were taken to another residence and some of them to other houses

belonging to the mother. Some of the chattels were from time to time disposed of by the mother. The daughter was subsequently placed under medical care, and ceased to reside with her mother, who in certain proceedings swore an affidavit as to the kindred and property of the daughter, but did not mention the chattels comprised in the deed of gift. On the death of the mother it transpired that the power of attorney was not sufficiently wide to authorise the execution of the deed. Her trustees applied to the Court to have the ownership of the chattels determined. It was claimed on behalf of the daughter that there had been a redelivery of the document by the mother so as to make it a valid deed.

The Court of Appeal, affirming the decision of Mr. Justice Joyce, held that the mother had redelivered the document so as to make it a valid deed passing the property in the chattels to the daughter. This notional redelivery was held to have taken place at the interview in 1898, when, as the evidence shewed, the mother was put in full possession of the provisions of the deed. In the words of Lord Justice Buckley (108 L. T. Rep. 549; (1913) 1 Ch., at p. 489), at that interview she had in substance said: "I acknowledge that as my deed; take it and keep it as such."

The case is a clear modern authority upon the question of redelivery of deeds and is peculiar in this, that heretofore the authorities on this question have dealt with deeds made for valuable consideration, whereas in this case the redelivered deed was a voluntary deed of gift.

JUDICIAL RECORDS.¹

If you open the current Law Reports at a venture, you will see just under the names of the parties at the head of a reported case a collection of symbols like this

[1912 H. 938],

which presumably conveys no meaning whatever to the lay people. This is what we call "reference to the record." It is the key to the original and authentic documents containing the official history of every step taken in the action from the issue of the writ to the final judgment or other determination; a history which may cover a period varying from a few weeks in a matter of simple money claim (though such cases, I need hardly say, do not concern the Law Reports) to several years if it is a complicated administration suit in the Chancery Division. For twenty years these originals are to be found in the vaults of the Royal Courts; afterwards they pass into the custody of the Master of the Rolls at the Record Office, where they are permanently added to a series of judicial records unrivalled in the world for their extent, antiquity, and continuity. The selections of criminal and civil pleas which were among the first publications of the Selden Society contain entries of the year 1200. Through seven hundred years and more there has been change of many kinds external and internal; and yet no violent breach, unless the change from Latin to English in the eighteenth century be counted for such; but still change enough. An ordinary English scholar who knows classical Latin can no more read a judicial roll of our antique fashion than he could read a Hebrew roll of the Pentateuch, and an ordinary English lawyer would have but little advantage over him. First the script has to be mastered (and handwriting varied enough through the centuries, not for the better); then the business Latin of the Middle Ages, quite a living tongue in its day, very different from the Latin of the schools just because it was alive; and lastly the matter has to be understood. At this last lesson we are still working.

Conversely we may guess that a thirteenth-century Judge, assuming him to have learnt modern English and to be re-

¹ A lecture delivered before the Faculty of Law in the University of London, February 28, 1913.

conciled to the innovation of printing, would be no less bewildered at the sight of our twentieth-century files. I am not so sure, however, that the guess would be right without qualification, for in some things the whirligig of time has so brought us round that we are much nearer than Blackstone was to our mediaeval ancestors. If Henry of Bratton could be taken through the rolls of the subsequent centuries he might well shake his head at the stiffening technicalities of the fourteenth century, grumble at the flamboyant over-subtlety of the fifteenth, and cry aloud at the enormous verbosity of the sixteenth. When he came to the latest forms of Common Law and Chancery pleading in the eighteenth century—the time when Blackstone thought everything almost perfect—he might peradventure break out, clerk in orders and archdeacon though he was, into such oaths as are reported a little after his time in the mouth of Hervey de Stanton, nicknamed Hervey the hasty: “*Par le sanke qe dieu seigna!* if any pleader had tried to pass off such a heap of jargon on us, we should have said, and in rounder French than your English, that if he did not tell us something better in five minutes we should give judgment against him.” The guide (whom we must suppose conducting the learned and Elysian author, not without aid of supra-mundane speed and ease, through a series of typical rolls picked out for his inspection in the Record Office) would explain with deference that nowadays pleadings are not settled by discussion in Court. “So much the worse,” Bratton (to give him his conventional name) might reply: “all that writing with no prompt judicial check has spoilt your pleaders’ common sense.” Nor would he be wholly mollified by an account of the modern interlocutory proceedings in Judges’ chambers which have taken the place of the old dialectic passages between the Court and counsel, so far as the place is supplied at all. We may as well go on overhearing the conversation between Henry of Bratton and the twentieth-century lawyer; it may be the shortest way to realise that there were many modern points about the thirteenth century.

Henry of Bratton. Then I don’t see where or how your young men learn pleading.

Guide. Well, sir, to be quite frank, they do not learn it; but then there is very much less of it to learn.

H. of B. How is that? Here is a roll of Queen Elizabeth before me, three centuries after my time, and so far I

can only see that the tangle gets worse and worse. And such writing! we wrote a good business hand, both justices and clerks, and set no store by the fancy tricks of the papal chancery, though I had to know those too.

G. Truly, sir, I am no great expert, and yet I can make a shift to read the rolls of your masters and companions; but I have known it three men's work to make out a roll of King Charles II.

H. of B. What was the Chancellor about that he did not amend these matters? It was his duty to keep the forms of the King's Court in order, so that the king might do true justice, as we read in some mighty pretty verses writ by John of Salisbury, who was a great clerk—but perhaps you have no memory of him?

G. Now I am sure you are jesting or trying to catch me out in ignorance. If you and your companions hear anything in Elysium you must have heard that John of Salisbury acquired a European reputation and was quoted by learned Italians as Policratus Anglicus; and our news travels slow if you have not yet heard that his *opus magnum* is excellently edited by an Oxford scholar with all the honours of the University press. But for the Chancellor, sir, there were stiff-necked folks who would not let him invent anything: it was so already in your time: surely you remember the Provisions of Oxford and the oath by which the barons tied him up? And so he had to get a jurisdiction and a court of his own, about which I suspect you know more than you let me see, and the proceedings, while they were never so formally precise as those of the Common Law, became even more long-winded and cumbrous, and quite as captious.

H. of B. So it seems, indeed. Here is eighteenth-century writing; it is from the time of my successor Blackstone, who had the advantage of using his mother tongue as a polished literary language, and so surpassed me greatly in form. But when you talk of mistakes in Roman law, now, you must remember in charity that Exeter was a very long way from Rome, and I had to puzzle out my Azo mostly by myself. Really I think Blackstone's dogmatic and historical mistakes about Roman law had less excuse than mine, for surely he might have consulted doctors of the Civil Law at Oxford.

G. Very true, sir, but I could shew you one place where Blackstone was misled by a more learned man than himself, no less a man than John Seldon.

H. of B. Certainly we are all fallible. Anyhow my brother Blackstone was too easy-going when he tolerated this monstrous overgrowth of parchment.

G. Suppose we skip a century or so; you may find something to please you better.

H. of B. Why, this is printers' work; plain enough to me too, for it is not much unlike my grandfather's writing; and the pleader sets out to tell the story so that one can see at least what the suit is about; and most of the rubbishing jargon is done away with. But at Westminster they are still writing on parchment late in Queen Victoria's time, it seems, and their forms are only in part more intelligible. The Chancellor had got some way ahead of the King's judges—I mean the Queen's. But what is this title of his that catches my eye at the head of a printed bill? Lord High Chancellor—of Great Britain.

G. By your favour, sir, he had been so for about a century and a half.

H. of B. Yes, I remember now, but the name of Great Britain is a strange mouthful to a thirteenth-century Englishman. We old fellows can hardly get over our surprise at the Bishop of Durham no longer being a great frontier chief, with the cares of a secular principality, and Scottish foemen to provide against. It was little I heard tell of Scots in Devonshire, but I met northcountrymen at the King's Court and listened to their tales of border feud and forays. Well, the kingdom has grown out of all knowledge, and our children have played, up and down the world, the part of the *gens robusta et longinqua et ignota* foretold by Jeremy the prophet; I have heard talk of your judges having to learn strange heathen laws.

G. That tale is elsewhere, sir. Of the King's Council and what has sprung from it we can hardly speak now, for it is a long matter. Let us pass on to the latest records.

H. of B. Well done, young fellows; this is better still. I should not have thought you could clear yourselves of all those cobwebs, and make for the simplicity I was trying to attain in my own time. So you have got rid of the diversities of Courts, and restored our lord the king in possession of his one Curia Regis. Well done, I say again.—

G. Now, sir, let us go back to your old rolls for a moment. See here your own marks, which have been brought

to light again in these latter days, in the margin of the cases you took out for your note book.

H. of B. A good sight; and better to see that book well handled and made free of the world of letters; and best of all that the work was done by a fellow west-countryman, almost a neighbour of mine.

G. I should guess, if it were lawful to guess, that you have already had right good talk with Maitland.

H. of B. My young friend—for even when your hair is turning grey you all seem very young to me—you shall not imitate the pleader who wanted to be *plus sage qe Dieux*. We may not report the matter nor the manner of our heavenly converse; and you would not understand it if we might. This visit of mine is exceptional enough of itself, such a thing as does not happen *nisi aliquando de gratia*. But you may salute for me the good clerk who found my book, Paul the son of Gabriel whom Oxford has captured from the far land of Muscovy. . . .

When that guide awoke he felt certain pricks of conscience, wondering whether he ought to have produced the Rules of Court and the White Book, and how far Henry of Bratton's approval of our simplified pleading might be damped by the contemplation thereof. But it is certain in any case that the White Book is not of record; and therewith his conscience was pacified.

This imaginary dialogue, which might be indefinitely extended, may serve as well as any other device to recall to us in a summary way what an immense amount of legal and political history the records of our Courts have embodied, and the fact that for much of it they are the real ultimate authority. I will mention here a little technical point for the sake of any student who may be puzzled by it, as I was for a time.

Sir G. Jessel once committed himself to the statement that the Court of Chancery was not a court of record.² The only reason he gave was that the records were in the custody not of the Chancellor but of the Master of the Rolls. The statement is directly contrary to Blackstone's,³ and, with great respect, the reason is doubly wrong. First, according to general understanding and practice the Master of the Rolls was only the Chancellor's deputy, though this was not free from controversy. Secondly, the decisive mark of a

² L. R. 20 Eq. at p. 347.

³ Comm., i. 68.

court of record, according to Coke's opinion given in two places, is not that the Judges of the Court keep the record, but that the record itself is the only authentic and conclusive proof of what the Court has done. It is a minute question, for nobody doubted the power of the Court of Chancery, but still worth clearing up. Coke might just possibly have denied the name of a court of record to the Court of Chancery in its equitable jurisdiction on the ground that its procedure was not according to the course of the common law. This would obviously not apply to the functions of the Court in the issue of writs and the like, as *officina iustitiae*, or as holding pleas in its "ordinary" legal jurisdiction.* He might also have taken the still more technical exception that the Chancery proceedings were not entered in a parchment roll like those of the Common Law Courts. Both these reasons would have involved an equal refusal to call the Star Chamber, a very exalted Court according to Coke's own statement in the Fourth Institute, a court of record. In point of fact I do not find that Coke said or suggested any such thing with regard either to the Star Chamber or to the Court of Chancery.

We have lived so long with our unique wealth of documents that we take it as a matter of course and fail to be duly thankful for it. Let us consider for a moment the state of modern Romanists, and what they would give for a tithe of our resources. Many scores of learned volumes have been written about the procedure of republican and early imperial Roman law. No small amount of what had been written before the nineteenth century was rendered obsolete when the Verona palimpsest of Gaius gave up so much of his buried text as could be painfully revived. But how much greater would our enlightenment be if we could recover a complete record of the proceedings in a single action under the formulary system. It is hardly uncharitable to suppose that about three-quarters of the learned monographs would lose their importance, be it greater or less. Reports of Roman forensic oratory we have, and at great length; but they are insufficient not only because Roman advocates, it seems, allowed themselves great latitude in deliberately talking bad law to an unlearned Court, but because their speeches assumed the very things to be known which the modern Romanist does not know and would like to find out.

* Bl. Comm., iii. 48, 49.

Not that the official record alone, in any system I have heard of, would tell us the whole practice. But a report alone, official or unofficial, will even less enable us to understand the whole matter without authentic knowledge of the formal procedure. Our experience with the Year Books has given ample proof that in the case of a report made by private enterprise the record is of the utmost value as a check. I say private enterprise, for, with all respect for Mr. Pike's ingenious attempt to save the face of Bacon, Coke, and Blackstone, I hold that the legend of the Year Books having had an official or even semi-official character (which I tried to find credible as long as I could) is now finally exploded. The check in question is likewise applied from time to time by the Court itself, as every habitual reader of the current reports knows; and seldom without profit. Neither is this practice merely modern; we have at least one case, at present accessible only in Brooke's Abridgement,⁵ where the Judges corrected an erroneous account of the actual decision in an earlier Year Book by comparing it with the roll.

Accordingly the fathers of English reporting, Plowden and Coke, writing in the days when there were no published books of practice, were at the pains of setting out at the head of their reports a copy of the record itself or at least the pleadings. Considerable extracts from the pleadings, I need hardly remind this audience, are quite common in modern common law reports; and similarly in equity cases, where the exact form of the decree is often material, the minutes of decree were frequently added. It depends on the nature of the case, and the procedure applicable to it, how much or little information about the facts in evidence and the reasons for the decision can be derived from the official documents.

A learned person lately said of the rolls of our Courts as distinguished from reports that "the objects of the record are science and jurisprudence." That is exactly what officials and archivists would deny. The business of the record they would say, is to shew what was officially done, and nothing else; or if it does shew anything else, that is a superfluity which were better done away with. We are to learn from the roll what rights were asserted and denied by the parties, what was at issue between them in fact or law, and what judgment was given. How far any rule of general importance was laid down, to what extent received opinion or current practice is

⁵ Tit. *Executor*, pt. 22.

affected, whether the facts were of a familiar kind or novel, these are things we must find other ways of learning. Hence the distinction of which we are aware from our earliest student days between a record and a report. The record is authentic; a report has not, in this jurisdiction, any authentic or even official character, and can always be contradicted by a more accurate report or even by the clear recollection of the Court or counsel, though this does not often happen. Lines of technical distinction are in law, as in other sciences, more clearly and sharply drawn in later than in earlier days; and so we need not be surprised when we find that in the middle of the thirteenth century the Westminster record may tell us a good deal of what the case was really about, but in the middle of the eighteenth century it will, oftener than not, tell us nothing. The mediæval fashion may be conveniently seen in Maitland's edition of Bracton's Note Book, and that of our great-grandfathers in the forms printed by way of appendix in the older and genuine editions of Blackstone's Commentaries: forms which ought to be studied, as well as the untouched text of the author himself, by every one who desires to understand the history of modern English law. In Chancery proceedings, on the other hand, all the facts relied on had to be asserted in the course of pleading, and therefore we have the story, though in a form which became more and more cumbrous and involved as the Court of Chancery developed a fixed procedure, and was reduced to rational order and dimensions only in the middle of the nineteenth century. Neither in common law nor in equitable procedure were the reasons for the ultimate decision apparent on the record itself, though in many cases a competent lawyer with the pleadings before him could form a pretty safe guess as to the point or points on which it turned. This, I think, may safely be said to be characteristic of the English judicial system, though I have no such extensive knowledge of foreign procedure as would justify me in either affirming or denying that our usage is singular.

It may be supposed that judicial records have lost much of their importance by reason of formalism having been abolished, or at least having greatly declined, in modern procedure. Such a view, I think, would be superficial. It is true that slips in procedure are no longer fatal, and that it is not necessary to disguise questions of principle under apparently technical controversies as to the proper form of ac-

tion. But it is impossible to conduct the business of administering justice without rules of some sort; those rules have to be interpreted; and the necessity for applying them to unforeseen facts may raise questions that go much deeper than form. A dispute whether a writ can be served out of the jurisdiction, for example, must not be assumed to be merely technical. It may depend on a determination of nationality, and require the Court to consider and review principles not only of general but of cosmopolitan interest. On the other hand, the manner in which questions of this kind arise, and the fact that they arise at one time rather than another, must in large measure depend on the structure of legal procedure even in the most modern and rational system. Roads are for the sake of traffic and not traffic for the sake of roads, and yet when a road is made the traffic has to follow it. So do the conditions of procedure, once established, determine the form of substantive legal problems and the lines on which they can be solved. The framework of procedure supplies the conventions without which no art can be practised; for in truth all art, from dancing to pleading, is conventional, and innovators who speak brave words about doing away with convention are only setting up some new convention of their own, which may be good or bad as it happens. Thus every new legal form and every material modification of an old one is a possible nucleus of further development which may very well be more than formal. It is also to be noted that many questions are on the borders of procedure and substantive law, questions of parties for example. Whether any man has done me a wrong, or owes me a debt or an account, and who, is certainly a substantive question, and finding the right man to sue can hardly be called an affair of procedure. But then questions may arise, in affairs of a certain complexity, whether other people are not necessary parties, whose business it is to bring them before the Court, and in what form; and if these are not matters of procedure it is difficult to say what is.

There is a great harvest of knowledge yet to be gathered from our judicial records and the documents associated with them, and so far the labourers in any one generation have been few. Some difficulties are in the way, but not comparable to those that have been overcome in many other fields of scholarly research. It is simply a matter of having enough competent workers and encouraging them to carry on the work.

The method and instruments are sufficiently known, and there are masters willing to teach, but they want more learners. Is it not fit to be considered what can be done in this behalf by the young and vigorous law faculty of a university established here in London, within easy reach of the centres of legal and mediæval learning and the Record Office itself? Perhaps it may not be presumptuous to suggest that the local circumstances afford good reason for some special determination of your university's higher legal studies in this direction. There is the certainty of dissertations being required for the higher degrees, and candidates are often glad to have some guidance in choosing their subjects. There is the possibility, I should hope some probability, of a seminar such as my friend Prof. Vinogradoff is already conducting at Oxford. Moreover, although for anything I know this may be, for the present, a counsel of perfection, I do not see why candidates for the higher honours of the faculty should not be expected to show some acquaintance with the language and the materials of our mediæval law. It is unhappily true that in the Inns of Court it is quite possible, partly for the hardness of men's hearts and partly for accidental reasons not necessary to mention here, to satisfy the requirements of the Bar examination, which include Roman law, without being able to construe a sentence in Latin. But surely there can be no need to exhort a university audience to regard that state of things as warning rather than example. Many years ago I was examining for the Law Tripos at Cambridge, and overheard some examinees discussing a paper set by myself the same morning. Their judgment was unfavourable. "I thought we should have questions on history," said one of them, "and they set a lot of beastly Latin." It is precisely the vocation of a law faculty which takes its work seriously to make it plain to students that without the "beastly Latin" they cannot have any history deserving the name, and without adding mediæval French to the Latin they cannot have any opinion of their own worthy of being considered by scholars, or even classed by examiners, on any part of the history of English law before the nineteenth century. My ideal Bachelor of Laws should be able to read the usual constitutional and legal texts in Latin, and to make out plain Year Book French with the aid of Horwood's and Maitland's editions. My ideal Doctor of Laws would not necessarily be able to read an original roll or a Year Book MS. with certainty, but I should like

him to know what they look like, and I should certainly want him to be able to check a translation from either in print, short of the really obscure passages where translation has to be more or less conjectural. This involves, no doubt, a fair knowledge, and the more all-round the better, of both mediæval Latin and mediæval French: I do not see why that is too much to expect. For a man, at all events, who has already grappled with the niceties of classical Greek and the intricate structure of Latin, the task cannot be deemed formidable; and it seems likely that for some time to come our scholars in legal history will be mainly recruited from those who have passed through some classical training. Moreover, I think the suggested requirement would be well fitted to discourage amateur antiquaries from trying to pose as jurists; and I really do think there is less danger to legal science from the frank and shameless ignorance of the illiterate practitioner than from the sciolism and wild guesswork of the half-trained amateur. Great is the wilderness wherein the wild mare maketh her nest, and many there by that find it. What is more, the lay people may take those deluded adventurers for real explorers and discoverers, as like as not; for most laymen believe all law to be so absurd that no doctrine in or about it can be too absurd to be probable.

We have, besides our judicial records proper, large classes of official and administrative documents more or less closely connected with judicial proceedings, and at times so much mixed up with them that it is hard to say where the judicial character ends and the merely official begins. An obvious example is afforded by the revenue side of the Exchequer. The reasons for seeking to increase the knowledge of these records, and the profit to be derived therefrom, are much the same as in the case of records actually belonging to Courts of judicature, and most of what I have said is equally applicable to the semi-judicial or quasi-judicial archives.

As to the actual denominations, distribution, and custody of our judicial and official records, it may be useful to some of my hearers to indicate very briefly where the proper information can be found. Everything necessary for the student's guidance, except the elements of history, law, and politics on the one hand, and detailed instruction in language and palaeography on the other, is given in Mr. Scargill Bird's Guide to the Public Records and other Record Office publications, the article "Record," by Mr. Crump of the Record Office, in the

eleventh edition of the *Encyclopædia Britannica*, Mr. Hubert Hall's *Studies in English Official Historical Documents and the accompanying Formula Book* (1908-9), and (by no means least, though it is quite a short tract), Mr. Pike's Oxford lecture on "The Public Records and the Constitution" (1907). Mr. Pike's article on the Record Office in the *Encyclopædia of the Laws of England*, and the First Report of the Royal Commission on Public Records (1912), may also be consulted. This is very far from exhausting the profitable literature on the subject, but it is enough to begin with. In this lecture I have purposely avoided any fragmentary presentation of facts which have been methodically and fully set out by men acquainted with them at first hand, and which mostly do not admit of profitable or safe abridgement.

FREDERICK POLLOCK.

EVOLUTION IN ANNOTATION.

BY HENRY P. FARNHAM, M.L.

[ED. NOTE—Mr. Farnham's long experience and high standing as a law editor and legal author eminently qualify him to speak of the progress which has been made in furnishing the lawyer with better working tools, and of those editorial ideals which ever tend to make the modern law library more valuable and efficient. This is a practical question worthy of the careful attention of every busy practitioner.]

A report of a law case which makes no pretention to being annotated to-day is almost as rare as was the case which was annotated thirty-five years ago. The theory seems to prevail that the duty of a reporter is not done if he merely furnishes a correct copy of the opinion with accurate headnotes, adequate statement of facts, and helpful excerpts from briefs. He must, in addition, give the reader some additional light upon the problems solved by the Court by reference to other cases in which the same or similar problems were involved. The spirit which animates this additional matter is good in all cases, and when the publication is sold, largely because of its annotation, it is necessary. While a judicial decision is now, as always, an application of a principle to a given state of facts, the modern lawyer is not satisfied with one elucidation of the principle, no matter how accurate and profound, but he wishes to know how other Courts have dealt with the same question, even when he himself is capable of discerning the principle and reasoning to a proper conclusion the question of its applicability to particular states of fact. If he is not capable of thus reasoning as to principle, he insists upon knowing the various conclusions which have been reached in cases presenting similar facts, and to be given the opportunity of counting the decisions upon the respective sides so as to know what the weight of the authority is. Aids to this knowledge are, therefore, welcome and more or less helpful; according to the fullness and accuracy of the information conveyed. To furnish these aids, annotation is furnished. This is of many varieties and many degrees of excellence. That requiring the least effort, and costing the least money, is composed of references to places where cases have been gathered either in notes to other reports and text-books, or in digests. The value of this annotation depends entirely upon the quality

of the work to which reference is made. If it is to a carefully prepared and exhaustive collection of cases which are fully set out, accurately classified and distinguished, it may be very helpful in pointing the reader to the place where he will find a solution of his problem. If it is to a mere collection of cases which are not classified or distinguished, it may save a little time by relieving the reader of the necessity of searching through books of reference for himself, but he is still left to do most of the work in examining original sources and ascertaining the true force and value of the cases cited. If it is to a section of a digest, it merely saves him the time which would otherwise be required to turn to the scheme of the subject in the digest to ascertain which section deals with the subject-matter under examination which, when found, is the mere crude material from which briefs, reports, and annotation proper is made; for experience shews that as cases are collected in a digest section, with nothing to shew their distinguishing or harmonizing features, the material found is little better than a reference to so many cases to look up.

SUBSEQUENT HISTORY OF CASE.

Another class of annotation which is of value within certain narrow and well-defined limits is that which shews where the reported case has been cited, criticised, followed, explained, distinguished, or overruled. This class of annotation has two principal values: First, it shews how the case under consideration has been treated by other Courts, and therefore, to an extent, its value as a precedent; and, second, it sometimes, in cases containing novel points, assists in finding other similar cases which might not be readily found in the ordinary reference books. If the citing cases are unclassified, the reader may have to examine a large number of references without finding anything of value to him, the citations being to minor or unimportant points in the cases. This annotation is more valuable if the citing cases are classified, but a serious objection to it is that it is likely to furnish only cases in harmony with the case under consideration, and thereby mislead by failing to disclose what there may be on the other side. If this annotation is properly classified, and its limitations are kept in view, its value is sufficient to justify its addition to the library.

LEADING CASES.

Another class of annotation consists of a collection of leading or important cases more or less in point with the case reported. This annotation is usually prepared by the Judge writing the opinion, or by the official reporter of it. Its value depends upon the care with which the cases are chosen, and the fullness and accuracy with which they are set out, the value increasing as the necessity for consulting the original reports diminishes. Of slightly more value is the annotation which purports to be an exhaustive collection of the cases in point, arranged in a few general groups, with now and then an illustrating case set out fully enough to illustrate the general application of the principle involved. Experience teaches that few cases are actually on all fours with respect to the point actually decided in them. Many may be found which will lay down the same broad principle as a basis for reasoning, or as leading to the conclusion reached; and when many cases are found grouped under one proposition, examination will disclose that the reader receives little aid beyond ascertaining the general subject to which they relate, and that he must examine them, case by case, to learn what application was made of the principle involved, and whether or not it is of value in the solution of his problem. Such general grouping can be easily and quickly done, but, unfortunately, it leaves the reader to perform the real work himself, telling him only what cases to include in his examination.

Much more useful than the above is the annotation prepared by the competent text-writer, based on elucidation of the principle involved in the decision under review, illustrated and fortified by well-reasoned cases. This annotation seldom purports to make an exhaustive collection of cases upon the subject, but intends to utilize the leading ones, and so illuminate and expound the principle involved that the reader will have no difficulty in determining its scope and applicability, and will be able to settle his own problem whether he finds a case directly in point or not. Such work requires ability of a high order, incessant study, and a judicial temperament. Few annotators can produce satisfactory work of this kind.

EXHAUSTIVE ANNOTATION.

The highest evolution in annotation, and that which the best publishers are more and more nearly approaching, begins with an absolutely exhaustive collection of the cases bearing upon the subject in hand, and a search for the underlying principle which should be applied to its decision. From the cases collected is prepared an elucidation of the principle involved, so clear that the reader will have no difficulty in determining what the law is, and why, setting out each case fully enough to indicate how the principle was applied in it, and just what it is worth as a precedent, indicating the best-reasoned cases, and those decided by the strongest Judges, so as to enable the lawyer or Judge to examine the fewest cases possible in the preparation of brief or opinion. All cases are so classified, harmonized, and distinguished that the needed one may be found in the shortest time, and if any reason exists why a particular one should or should not rule the one under consideration that reason plainly pointed out. This gives ample scope for the profound study and constructive ability of the text-book writer, and the exhaustive and painstaking care of the case lawyer, and furnishes to the profession a combination of principle and case which is of the highest value. This is modern annotation in the true sense. By way of emphasis, this kind of annotation may be compared with the work of the digester. A digest paragraph is a mere index of the case for which it is prepared, without any thought of its relation to other cases upon the same subject. It is prepared not to shew the principle involved, but the mere accidents of the case as indicated by its facts. The result is that cases based upon the same principle may be so classified as to be found under different titles in the digest. A digest section, therefore, may not only not refer to all the cases which ought to be consulted to know the law with which it purports to deal, but even the cases which it does contain are not prepared for the purpose of shewing the law, but to shew what the decision was on a particular state of facts. One can gain little more comprehensive knowledge of a subject by reading a section of a digest than he could gain from a book by reading its index. Annotation states the law; a digest shews where one can find the law. A digest is a valuable aid in doing one's own work; annotation does the work for him. Annotation of this last type requires experience and ability

for its preparation. Twenty-five years ago the best editors in the country said it was impracticable, and could not be furnished. But when human effort was satisfied with nothing less than its ideal in other lines, progressive editors said, having seen this ideal, we will be satisfied with nothing less. To realize how far they have travelled towards this ideal, it is only necessary to compare annotation produced thirty years ago with the best produced to-day. One buying reports as such should thankfully receive such aids in the form of "annotation" as are furnished him, because he is getting therefrom much help gratuitously, but if he is buying annotation as well as reports he should select that which most nearly approaches the modern ideal above described.

THE COMMON LAW'S DEBT TO ANNOTATIONS.

BY GEORGE F. LONGSDORF, OF THE ST. PAUL BAR.

ED. NOTE.—This is the second of a series of interesting and instructive articles on the evolution of the modern law book and its changing forms and methods to meet the problems of the practitioner.

Against the many acknowledged virtues of the common-law system of law deduced from reported precedent, virtues such as adaptability, flexibility, and capacity for self-development and growth, have continually been set the alleged demerits that it was unscientific, that it was crude and formless, that it was too slow in its responses to new conditions. The facts that in all important English speaking communities the common law, with its system of precedents, furnishes the basis of all law; that it has there survived the test of use and experience; that the essential justice in the English and American laws is surpassed by no other system and approached by few other nations, ought to persuade one that the common law is thoroughly systematic and scientific; because an unsystematic and unscientific system could not probably produce the very qualities wherein it excels. If it were the sole product of Judges legislating under the guise of deciding, and if the labours of the Judges were left untouched to serve as the final contribution to the evidences of the unwritten law, chaos, delay, and uncertainty might be expected as the result; but the common law has never been a purely judicial product, however true it may be that the cases have been such. For, to use a common quotation, "the law is in the cases, but the cases are not the law." Therefore to know and state the law requires a post-judicial operation, just as it required the office of lawyers to evoke the decision which contains the law.

MAKERS OF THE COMMON LAW.

Three classes of lawyers, then, have made the common law,—the advocates, the Judges, and the writers, and each one of these classes has played a vital and indispensable part. The advocate has presented the question, the Court has decided, and the writer has recorded and expounded the precedent, each limited to the particular occasion and duty. Because of that limitation their correlative tendency has been to keep each other's operations true, and their com-

bined skill has solved many problems that no *a priori* system of laws or codes could have coped with.

SYSTEMATIZING THE CASE LAW.

Now the reason that the system of precedents has not produced an unscientific and chaotic law, and that the law has not been overwhelmed in mere numbers of precedents of widely varying worth and authority, is because it was the special business of the writers to deal with and prevent those particular tendencies. From the beginning they have done that work by devising methods and forms of books suitable to the needs of their times. They have so far done it well, and so long as "man can do what man has done," we may expect them to do it well.

CLASSES OF WRITERS.

Of the writers there are three prime classes, viz., the reporters, the digesters, and the commentators whose work is now principally done by the annotators. None of these classes is very distinct, though their functions cleave sharply. Ofttimes the work of performing two or more of these functions, such as reporting and annotating, has been done by one writer and published in the same book or set of books. Often, if not usually in the present day, such work is done by a highly organized and co-ordinated staff of writers, for in no other way can the mass of current and past decisions be managed.

The work of the reporter and that of the digester of cases is familiar, and the forms in which their work appears in print are not greatly various. They need no testimonial or any introduction to a profession that has known them both by name for hundreds of years. But the commentator and his modern progeny, the annotator, is a writer of many degrees and differences. His work and methods have been forced through many developments, and undergone many changes. Some have taken the name of annotator who were not worthy, while there are "commentatories" and treatises that are really nothing but digests. There are real commentaries nevertheless in this day, such as the Criminal Law Treatises of Wharton, Wigmore's Evidence, and Labatt's Master and Servant, and others equally well-known. We can pass from all these to the annotators, for

this is frankly a special plea in their behalf. They are now doing what may, perhaps, be as great a work for the common law as ever has been done, and that is the rectification and harmonizing of it into uniformity and systematic accuracy.

THE GREAT COMMENTATORS.

For several centuries in the history of the common law the need for such work was amply supplied by the great commentatorial and institutional works of Coke, Hale, Blackstone, and Kent, and the special treatises contemporary with them. Precedents were not numerous then as compared to now, and the office of the writer was as much to suggest the undeveloped doctrine for which no precedent existed as it was to reconcile and elucidate. Nevertheless there were annotators in those days worthy of the name. Occasionally they combined annotating and reporting, of which Serjeant Williams' notes to Saunders' reports may be noted as an example. His note to *Pordage v. Cole*, 1 Wms. Saund. 319, 18 Eng. Rul. Cas. 601, on Mutual Covenants in Contracts, is cited specially scores of times in the later books of reports, and may be said to have established for the law a systematic conception and analysis of that difficult subject. Very much of the work in Coke's Reports is essentially annotation. It does not avow that character by a typographical arrangement separate from the report of the case, as we do now. Indeed it is run into the body of the opinion, and at most is distinguished by the words, "But note reader that," etc., with which Coke was wont to introduce his own observations. Nevertheless it is annotation, and though Coke was sometimes criticized for it, as in the words of Lord Holt, who accused him of "improving" the reports (see *Coggs v. Bernard*, 2 Ld. Raym. 909, 5 Eng. Rul. Cas. 247, at 252), yet time has vindicated the work of Coke, and left such criticisms of bookish rather than practical interest. One eminent work of annotation, known well to all the old lawyers, was that in Smith's Leading Cases (vol. 1, 8th ed., p. 199), the forerunner of the great sets of selected cases of this day with their elaborate and exhaustive annotations.

MULTITUDE OF CASES RENDERS ANNOTATION NECESSARY.

It is because of the great augmentation in the number of reported cases, due largely to the multiplication of separate

jurisdictions in the United States, that to-day's problem for the special labours of the annotator has existed. When jurisdictions were few, and precedents not numerous, the practitioner and the Judge were able and had the time to thread the reason and principles of the law through the cases well enough without the help of a modern annotation. There were not multitudes of subtly applied illustrations of general principle to minutely variant facts. Instead of fifty there were a dozen jurisdictions, perhaps, to diverge from uniformity of doctrine and furnish confusion of authority, or, which was just as bad, the appearance of confusion. There were few of the anomalous or exotic doctrines such as the water laws, the mining laws, or the adapted civil-law institutions, which the western and south-western states brought into the body of American law and the over-sea colonies into the body of the English law. Up to that time the practice of a careful lawyer was to read all the decisions of his own state as they were handed down, and it was not a great task to do it.

DIGESTS OR CYCLOPEDIAS.

Almost contemporaneous with the great augmentation of cases, in fact one of its consequences, began the development of the modern digest or cyclopedia. While these were necessary and invaluable contributions to legal literature, and by no means to be disparaged by any comparison, they did have the effect to reveal to the every-day lawyer either "too many cases in point" or else by a distributive analysis that he did not follow they placed analogous and cognate cases in different topics, and he failed to find them. Either condition was unbearable, and, if the lawyer had been left to himself, irremediable. It began to be said that there were too many cases reported, too much authority, and some even wished for another Alexandrian burning of all the law books so that we might start anew. By poetic license the law was pictured as "a codeless myriad of precedents, a wilderness of single instances," which it never was and is not now. Nothing was wrong but that the common law had been growing and had outgrown the older forms of law books. The very same complaint was made by Justice Buller in 1786 (*Birch v. Wright*, 1 T. R. 383, 15 Eng. Rul. Cas. 626), when he suggests "wading through all of the old books" to "find a great collection of cases" in Comyn's Digest. Two years later, in 1788, Tomlin's Repertorium Juridicum (Dub-

lin, 1788), announced in its preface that a "vast accumulation of cases," amounting to 25,000 in forty years, necessitated an easy mode of reference to them, to wit, what we would call an index digest. We have 25,000 cases each year to deal with, and do it with skill that Tomlin or Comyn never dreamed of.

GENERALIZATION THE WORK OF THE ANNOTATOR.

The truth is that an evolutionary system of law like ours, wherein we generalize from cases to doctrines, there can not be too many cases. The law is enriched, and not smothered, by its many cases. But the generalizing must be done by careful and accurate method and with adequate expenditure of time, neither of which the lawyer can be expected to bring to such work. And so it has come to pass that, after the work of the great commentators, and in sequence the work of the digesters, has been done, need has developed the modern annotator and his methods. His work relieves the common law from the necessity of a Justinian or a Napoleon to recodify our law; for when a "conflict of authorities" is rightly and patiently examined, and the cases explained in a good annotation, the conflict is often found to have been an appearance, and not a reality, or else the true and the fallacious are sifted so thoroughly that the lawyer as he reads is freed from doubt and vexation.

SELECTION AND VALUE OF CASES.

Such work as this that the annotator does cannot be done in a digest or a text-book, or by any other known method than annotation of some well-chosen case. (See note on Rule in *Shelley's Case*, 29 L. R. A. (N.S.) 963, for example.) There are thousands of trite and common-place cases fit only to be data from which the law may be deduced, or perhaps only to be illustrations of long settled and well-understood rules. They must be reported in some way, if only that time and the general judgment of lawyers may assign to them their true value among the precedents of the law. On such cases annotation is too valuable to be wasted. They present nothing that requires more than the reporter and the digester can give, until the time when the annotator shall need to compare them with all the other trite or common-place cases in the production of some exhaustive and clarifying treatment of an important doctrine.

PURPOSE OF EXTRA AND CRITICAL ANNOTATION.

It is implied in the foregoing statements that the province of the annotator is chiefly within those departments of the law that are conflicting or vexatious, or full of varying minutiae, or novel, requiring the aid of difficult analogies because direct precedents are lacking, but it is not meant to exclude another form of annotation; namely, that which collates the citations of earlier cases and so arranges them as to shew the history and influence of each decision. These annotations, sometimes known as "extra annotations," trace judicial influences, while the others trace and co-ordinate doctrines and rules. They serve different and equally important purposes, though the critical annotation is of greater utility than the extra annotation, and requires more editorial skill in its preparation. Both classes of annotations, as distinguished from those so-called annotations which are merely collections of references, tend to harmonize and unify the common law of all the many jurisdictions, and in some degree to establish their general statutory law on a common basis of principle and reason. They do this by shewing what the law is, and its reason, in the difficult and obscure parts which neither digest nor text-book professes to do. Being narrow in its subject and intensive in its treatment, an annotation is specially designed to supply a process in the evolution of the law wherein all other forms of law books "by reason of their universality are deficient." They thus keep the common law of all English-speaking people a living and growing law, which neither breaks down into chaos under sheer numerical weight of precedents, nor is thrust aside for some petrifying code of substantive law; and if uniform laws in all the states shall ever be generally enacted they will have been made possible largely by the years of sifting and settling that the patient labours of the annotators of to-day have given the precedents. Their contribution to the common law is in keeping it true and uniform in principle, in freeing it from multifariousness of illustration, in adapting it by analogies to new conditions. That common law, which we believe to be the most excellent of systems, has been kept for us by the writers in the law. Each class of writers has had its part. None has done more than the annotators, and by no other means than annotation could their part have been done.

LAWYERS' MERRIMENTS.¹

Three generations of readers have passed away since the brothers Roscoe, in 1825, published their three little volumes entitled "Westminster Hall, or, Professional Relics and Anecdotes of the Bar, Bench and Woolsack." At that time they felt sure that the general public would regard with surprise any such attempt "to glean a few grains of amusement" from a subject so dreary as Law. But in the intervening decades book after book has been compiled in imitation of their attempt; and nowadays the publication of any new collection of legal oddities is more likely to provoke impatience than surprise. No doubt the store of such "grains of amusement" is ever on the increase. There are curious points, of general interest, that may be found in the Reports and Statutes themselves. And beyond these there are also the quips and cranks, the flights of rhetoric or of ingenious logic, the strange forensic puzzles or incidents, that escape all formal record, yet may be found incidentally chronicled in the newspapers of the moment or even in the biographies of eminent lawyers. But, happily, Dr. Murray has not devoted his pages to the superfluous task of telling over again the hackneyed tales of the witticisms of witnesses and barristers and Judges, the quaint customs of manors, and the unintentional absurdities that have slipped into statutory enactments. He has undertaken, and has well discharged, a much more novel task: that of enumerating the many ways in which lawyers, refusing to sink the shop when office hours were over, have made Law a means of amusement for their leisure. Indeed, his enumeration of these ways is so exhaustive, and therefore so rapid, that the reader, impatient for a little of that merriment which the title-page has promised him, feels inclined to cry out for less bibliography and more quotations. The French have, as Dr. Murray reminds us (p. 170), a proverb, "*Bon avocat, mauvais voisin.*" Nevertheless the successful lawyer, even should he prove himself this litigious next-door neighbour, will usually be found an entertaining diner-out. So we had hoped to see in this book many fruits of such men's humour. But they have been withheld. And, probably, wisely. For the fashions of humour, like all other fashions, change and fade. Indeed, this

¹By David Murray, LL.D. Glasgow: James MacLehose & Sons. 1912. 8vo. 302 pp. (7s. 6d. net.)

very volume abounds in painful proof that what furnished vast merriment for the lawyers of one generation is more likely to provoke a yawn than a smile from their successors of to-day. So we may well be content to accept it, not as a jest-book, but as, what is far more valuable, a permanently useful book of reference for inquirers into a singular and little-known field of literature. The author has done his work so carefully and so well that probably more than one generation of readers will use it and be grateful to him.

At the present time, when the exclusion of women from the legal profession has been brought to an end in some countries, and is being challenged in our own Courts by an action against the Law Society, a special interest attaches to the chapter devoted to the topic of Sex. In it Dr. Murray chronicles the achievements of at least three ladies—Bitizia Gozzadini, Novella Andreae, and a daughter of Accursius—who taught successfully in the great law-school of Bologna in its palmiest days; and of some jurists' wives who gave great help to their husbands in solving difficult questions of law (pp. 237-48). And the zeal of female aspirants to legal honours may well be intensified by reading all that our author has to tell us about the dignity which in mediæval times surrounded a Doctor of Laws. He might wear such golden rings and chains as were forbidden to the lesser of the nobility; might, in his coat of arms, display a helmet with the vizier raised; might carry weapons when other persons were forbidden to wear them. If convicted of crime, he was to suffer only a mitigated punishment; and, finally, if a person were killed in the presence of a doctor and some other man, this other man was presumed to be the guilty slayer (pp. 249-55). But the universities which endowed a doctor with all these privileges had need to be cautious as to whom they chose. For it was an arguable question whether any Faculty that had admitted to the degree an incompetent man might not be sued for damages by unsuccessful clients whose cases he had bungled. And the doctor himself had his disadvantages; for he must not stand in a crowd to watch any sports, as this would be an unseemly loss of dignity.

One of Dr. Murray's most interesting chapters is that (pp. 82-94) in which he gives an account of the various efforts that have been made to put the reports of judicial decisions into a metrical form. The earliest English effort of this kind dates back to 1742, when a versified edition of

Coke's Reports was published. Its merits may be sampled by its summary of *Cawdry's* case (5 Rep. 1.) :

'Gainst common-prayer if parson say
In sermon aught, bishop deprive him may.

The chapter on juridical proverbs and mnemonic verses is enlivened by the account of a modern collector of legal maxims, whose Latinity goes no further than to permit of his rendering *Messis sementem sequitur* as "Harvest follows Seedtime," and *Actor sequitur forum rei* as "The agent attends the Court where the business is carried on." It was only by a mistranslation of a more wilful and malicious kind that a Cromwellian satirist, to whom Dr. Murray introduces us (p. 63), rendered *Nisi Prius* as "First come, first served," *Capias* as "a Catch (to a sad tune)," and *Breve de Dote* as "Give the devil her due."

A book so full of the stores of proverbial wisdom naturally abounds in illustrations of the proverbial delays and disappointments which await the litigant, and which fully justify the wise counsel (p. 182) that a man "should go to law with a slow foot, but hasten from it with eagle's wings." Yet that advice seems to have been as often disregarded in bygone days as it is in our own. For we find (p. 178) a seventeenth-century lawyer complaining of the stomachfulness and perverseness of clients; who are of that contentious disposition that they will spend all that ever they are worth, so that they may have their will; malevolous spirits who cannot be content to undo themselves but strive to ruin others; and not only so, but strive to defame their learned counsel because the cause went against them."

The bibliophile will be interested in the chapter (pp. 206-25) on the various *éditions de luxe* in which paper-makers and printers and engravers have lavished their skill on legal treatises. None, however, of the juridical pictures to which Dr. Murray refers are so early as that sketch of A.D. 1242, preserved in the Corpus Library at Cambridge, which portrays the punishment of a traitor.

Many little points of interest are dealt with amongst the very miscellaneous contents of this volume. There is, for instance, the expression "Gentlemen of the Long Robe" as a synonym for barristers; perhaps obsolete now, though so recent a parliamentary orator as Mr. Gladstone himself used to employ it. Probably few, even of those whose reading has

made it familiar to them, know from what other profession the Bar were to be distinguished by the length of their gowns. But Dr. Murray makes it clear, from French parallels: "The long robe refers to an advocate or counsellor; the short robe (*'la courte robe,' 'la basse robe'*) refers to the other branch of the profession," i.e., to solicitors.

So wide is Dr. Murray's sweep that he does not disdain chronicling the uncleanly memory of the Judge and Jury Society of sixty years ago; where (as Thackeray puts it) "a mimic Judge administered a Bacchanalian law," but administered his fetid burlesque with a legal aptitude that astonished no less experienced a forensic observer than Rufus Choate, as the diary of his English tour relates. Yet only a passing allusion in a foot-note (p. 232 n.) is conceded to the "Parliamentary Logick" of a once-famous member of Lincoln's Inn—"Single-speech Hamilton." Dr. Murray might well have said more about this volume, with its five hundred pieces of practical advice to debaters, counsels deduced from forty-years' shrewd observation of the House of Commons. When the book first appeared, Windham found it worthy of study and of annotation. And some eighty years later it was thought worthy of translation into French by one of Gambetta's closest friends; from which we may conjecture that its maxims had not been unknown to that great tribune himself. It has indeed been described as the wickedest book in the English language; for nine-tenths of it are devoted to teaching the reader how to get the better of his controversial opponents when he knows himself to be in the wrong. But, since lawyers as well as politicians have often shewn themselves eager to be taught that evil art, Dr. Murray might well have afforded his readers a fuller notice of Hamilton's strange and singularly interesting work.

As might be expected in the retrospect of so long a period of literature, many of the earlier authorities cited by Dr. Murray are concerned with the relations between the legal and the spiritual aspects of life. Thus several pages (pp. 197-206) are devoted to the useful warnings afforded by the critics who, during eighteen centuries past, have exposed the ethical shortcomings of lawyers, or have held up before them a higher standard of duty. Dr. Murray does not seem to have noticed in this connexion that little manual, written by Edward O'Brien and edited by Aubrey de Vere, which was one of the early fruits of the Oxford Movement—"The Lawyer:

his character and rule of Holy Life"; an imitation, and a skilful one, of the method and diction of George Herbert's Country Parson. The lawyer's clients are, however, informed by Dr. Murray how they may borrow, from a French sixteenth-century parish-priest of Avranches, a manual of psalms and canticles for the daily expression of their varying emotions during the shifting fortunes of a lawsuit (pp. 168-70). Again, the conscientious jurist may alarm himself by learning (pp. 170-4) how many of the treatises of his professional colleagues have provoked the disapproval of the Church and been placed on the Index Expurgatorius—a fate that befell even such great authorities as Vinnius and Dumoulin. Hottoman of Basel, we are told, fell under this official censure for having respectfully referred to Justinian as a good Christian, without taking the precaution of adding that the eulogy was not meant to include the years in which that emperor leaned to the Eutychian heresy. And, even more properly within Dr. Murray's professed field of "Merri-ments," a connexion between matters ecclesiastical and matters legal is still traced by him. Thus we read that in a scandal (pp. 93-5), which arose amongst the Presbyterians of London in 1824, a mock trial of the impugned minister "before the Lord Chief Justice of the Court of Common Sense and a special jury" was published; apparently from the pen of the then popular novelist John Galt. It may be conjectured that it was inspired by a pamphlet of a hundred years earlier (which Dr. Murray does not mention though it was so popular as to obtain repeated republication during half a century),—the "Trial of Wm. Whiston before the Lord Chief Justice Reason." In this satire "Mr. Solicitor-general Codex (i.e., Bp. Gibson) prosecutes; and all the writers of the New Testament appear as witnesses for the defence, to sustain the accused Arian against the attack of Convocation.

Yet much graver treatment of theology may also be found in Dr. Murray's pages. St. Thomas Aquinas, if our memory be correct, took into consideration the question whether baptism can be validly administered by a Jew or a Pagan; and ultimately pronounced in the affirmative. But a still more startling question, as we learn from the book before us (p. 228), is propounded in one of the legal manuscripts of Raymond Lully, the Doctor of Illuminatus of the thirteenth century. Lully set himself to the question, whether a man could

be validly baptized by the devil? The conclusion which he reached was unfavourable to the bold suggestion. Students of Roman-Dutch law may remember the gravity with which Voet (xix. 2, 23) treats a problem of kindred nature—whether the tenant of a house will be entitled to rescind his lease if he finds the premises to be haunted by ghosts. He pronounces in favour of the right of rescission; though he prudently warns the tribunals to demand very clear proof of *daemonum illusiones istiusmodi*.

The connexion, however, of Satan with legal literature goes far beyond Lully's casual instance; as Dr. Murray devotes thirty pages (pp. 131-60 to shewing. The fact might indeed have been inferred from the familiar Italian legend about the advocate who, when turned blindfold into a church to select for himself and his brethren a patron-saint, stumbled over the base of the statue of the victorious St. Michael, and, clutching the defeated and prostrate fiend, cried "Here is our patron." But from the twelfth to the eighteenth century various authors, inspired no doubt by the analogy of Miracle-plays, seem to have occupied themselves in attempts to communicate religious instruction to the ignorant by throwing it into the form of imaginary lawsuits between diabolical and divine litigants. Dr. Murray does not, however, mention what is probably the most brilliant, though perhaps the briefest, of such efforts. Lope de Vega, in his great drama *The Discovery of America*, has a scene where an action of ejectment is brought before the Heavenly Judge, by Christianity, to recover from the devil the new found continent. The defendant puts in, as might be expected, a plea of immemorial prescription. But the plaintiff meets it with the successful argument that prescription requires bona fides, and it certainly is not to be found in Satan.

Neither these superhuman beings, nor those less than human, appear as parties in any modern litigation. Yet a notable section of the book (pp. 127-31) is concerned with the legal prosecutions that have in past ages been directed against animals. A variety of useful references are given; though it seems an exaggerated generalization to say (p. 127) that "on the Continent, down to a comparatively late period, the lower animals were in all respects considered amenable to the laws."

COURTNEY KENNY.

THE RECENT CONTROVERSY ABOUT NEXUM.

It is my duty in the first place to speak in memory of my predecessor, Dr. James Williams. To do justice in a few words to a man of so varied attainments is not easy. Dr. Williams was a poet and an exceptional linguist, and he was learned in English as well as in Roman law. I may cite as characteristic works of his wide culture his monograph "Dante as a Jurist" and his "Institutions of Justinian illustrated by English law." To say of a man that he knew many things seems to imply that he knew none of them deeply. But no one who was acquainted with his work, no one, for instance, who heard his inaugural lecture in this hall, could fail to be impressed by the extent of his knowledge of the law which he was called upon to profess. Bad health, most courageously borne, alone prevented him from reaping to the full the harvest which comes to a scholar who in the maturity of his knowledge preserves his vigour unimpaired.

I. INTRODUCTORY.

The problem of *nexum* is raised by the descriptions which Livy and Dionysius give of the condition of the insolvent debtor in early Rome. He is *nexus*, that is, in a state of bondage to his creditor, obliged to work for him and to submit to personal restraint and chastisement. A well-known passage of Varro² lays stress on the same feature: "a man was called *nexus* who, though free, gave his services into slavery instead of money which he owed, until he paid it." This bondage, we are told by several authors, was abolished by a *Lex Poetelia*, of perhaps 326 B.C. "All *nexa* of citizens were dissolved," says Cicero, "and the practice of *nectere* ceased."³

Aes Alienum leading to bondage until the *Lex Poetelia*, that is the situation out of which arise our problems. We ask what were the legal institutions underlying that situation, in particular what was the legal form of the contract of loan, and by what steps or stages did the debtor pass from borrowing to bondage.

The importance of these questions was not lost on Sir Henry Maine.⁴ *Nexum*, the contract, like mancipation, the

² The passage is quoted *infra*, p. 139.

³ De Repub. 2, 59 'Sunt propter unius libidinem omnia nexa civium liberata nectierque postea desitum.'

⁴ Ancient Law, chapter 9.

conveyance, was a ceremony *per aes et libram*, and the interest of the matter for Maine lay in the way in which a rudimentary distinction was established between the two. Does contract derive from conveyance, or is it impossible to conceive of conveyance except in opposition to contract, so that the two ideas must develop together?

The origin of the idea of obligations arising from wrong is well known. We start with self-redress or vengeance, which is gradually regulated, and we pass by observable stages through voluntary to compulsory composition. Here the Roman sources agree with the results of comparative law. But the origin of obligations arising out of agreement is not so simple. In other systems of law it has been traced to some extent to the practice of giving hostages or guarantors for blood-money. This develops into a system of self-guarantee, and so of direct conventional liability of the principal debtor, taking sometimes the form of a self-pledge or of a conditional self-sale by the debtor. One of the questions which we must ask to-day is whether these analogies will unlock the riddle of early *nexum*.

I must deal first with our sources. The historians⁶ raise the problem as I have put it—*aes alienum* leading to bondage—but that is their main contribution.

It is impossible to infer a consistent picture of legal details from Livy or Dionysius, particularly from Livy. The legal form of the matter was not their chief interest, and if it had been, their account of it would not have commanded great confidence. The other sources emanate from men who at any rate were accustomed to think juristically; but to all the sources alike applies the reflection that they were written centuries after the abolition of *nexum* in its primitive form.

These other sources consist of one passage of Varro,⁷ three of Festus,⁸ a number from Cicero,⁹ one of Gaius,¹⁰ one

⁶ The passages in Livy are fully set out in Roby, *Private Law*, 2 pp. 297 ff. 7, and so are readily accessible to English readers. The passages in Dionysius are most fully set out by Kleineldam, *Die Personalexekution der Zwölftafeln*, Breslau, 1904. pp. 62 ff., viz. 4, 9, 11, 5, 53, 64, 69, 6, 23, 24, 26, 29, 37, 41, 46, 58, 59, 76, 79, 82, 83, 16, 5.

⁷ *De L. L.*, 7, 105.

⁸ Festus, p. 173. s. v. *nuncupata*; p. 165, s. v. *nexum* and *nexum aes*.

⁹ See Roby, *Private Law*, 2, pp. 304-5.

¹⁰ Gaius, 2, 27 '*prorincialis soli nexum non esse*.'

of Frontinus,¹⁰ one of Boethius¹¹—at first sight a formidable array. But the list includes every known passage in which the word *nexum* bears a technical sense before it fades into a general term for obligation in the Digest and the Codes. Only one passage in Cicero (De Repub. 2, 59) refers directly to our *nexum*, that already quoted in which he describes its abolition. According to the ordinary Ciceronian usage, like that of Gaius, Frontinus, and Boethius, *nexum* means simply the conveyance *per aes et libram*. In short, in these authors *nexum* is equivalent to mancipation.

This usage of the word may indeed be highly significant, but at any rate it reduces the bulk of our authorities. There remain the one passage of Varro and the three of Festus.

Varro, de L. L. 7. 105, "*Nexum Manilius¹² scribit omne quod per libram et aes geritur, in quo sint mancipia. Mucius quae per aes et libram fiant ut obligetur¹³ praeter quom¹⁴ mancipio detur. Hoc verius esse ipsum verbum ostendit, de quo quaeritur, nam id aes,¹⁵ quod obligatur per libram, neque suum fit, inde nexum vocatur. Liber qui suas operas in servitutem pro pecunia quam debebat dabat¹⁶ dum solveret, nexus vocatus,¹⁷ ut ab aere obaeratus.¹⁸ Hoc C. Poetelio Libone Visolo dictatore sublatum ne fieret; et omnes, qui bonam copiam iurarunt, ne essent nexi, dissoluti.*"

Here we have definitions of the transaction of *nexum* by Manilius (probably the consul of 149 B.C. and according to Pomponius one of the founders of the civil law) and by Mucius (who is probably the celebrated Q. Mucius Scaevola, consul 95 B.C.). To these definitions is appended a description of the man *nexus* which I have already quoted. Though the whole passage is of fundamental importance, its cogency is much impaired by the state of the text, difficulties of interpretation, and the fact that even Manilius and Mucius are not very good authorities for an institution as it existed before 326 B.C.

¹⁰ Ed. Lachmann, p. 36, '*Stipendiarii nexum non habent.*'

¹¹ Orelli, p. 322.

¹² Ms. *Manilius*. The text given follows Mommsen, Zeitschr. d. Sav.-Stift, Rom. Abt. (=ZSS.), 23, p. 349, n. 1, and p. 354, n. 3. See also Kretschmar, ZSS. 30, pp. 61-4.

¹³ MS. *obligentur*.

¹⁴ MS. *quam*. The emendation is not strictly necessary.

¹⁵ MS. *idem*. Mommsen l. c. conj. *aes*; generally accepted.

¹⁶ MS. omits *dabat*.

¹⁷ MS. *vocatur*.

¹⁸ MS. *obaeratus*. Mommsen's conj. *obseratus* (l. c.) is very tempting, but it appears to have passed unnoticed.

The Festus passages are hardly less important.

Festus, p. 173, "*Nuncupata pecunia est, ut ait Cincius in L. H de officio iuris consulti, nominata, certa, nominibus propriis pronuntiata: cum nexum faciet mancipiumque, uti lingua nuncupasset, ita ius esto. Ita uti nominavit locutusve erit, ita, ius esto.*" We are in the habit of referring the saw "*cum nexum faciet,*" &c., to the Twelve Tables, and if this ascription is correct, we have here by far the oldest mention of *nexum*.

Festus, p. 165, "*Nexum est, ut ait Gallus Aelius, quodcunque per aes et libram geritur, id quod necti dicitur; in quo genere sunt haec: testamenti factio, nexi datio, nexi liberatio.*" The jurist Aelius Gallus here confirms and somewhat extends the contemporary Ciceronian usage.

Festus, p. 165, "*Nexum aes apud antiquos dicebatur pecunia quae per nexum obligatur.*" No authority is given for this remarkable statement. Festus himself belongs to the second or third century, B. C., but his work was abstracted from that of the Augustan Verrius Flaccus, who in turn depended upon Varro.

In this state of the sources we have a fertile ground for hypotheses. There is just enough to make us speculate, too little to give us proof. And therefore we are not concerned with a question of right or wrong, truth or untruth, but of probable or less probable. The rival possibilities may even be found to be pretty equally balanced. At any rate it is too late for new suggestions, every possible view has been represented, and our duty is chiefly one of critical appreciation.

II. NIEBUHR AND HUSCHKE.

The nineteenth century bequeathed to us two principal theories of *nexum*, that of Niebuhr¹⁹ and that of Huschke.²⁰ Indeed, in the last quarter of the century, this volcanic controversy assumed a delusive appearance of extinction, since the Huschkeian theory, in a modified form, received almost universal acceptance.²¹ But adhesions must be weighed as

¹⁹ Röm. Gesch., 1, pp. 322 ff. (Berlin, 1853).

²⁰ Über das Recht des *Nexum*, Leipzig, 1846.

²¹ A long list of Huschke's followers is given by Senn, Nouvelle Revue Historique (= N. R. H.), 1905, p. 52, n. 4.

well as counted, and Niebuhr continued to have weighty adherents.²²

In 1901 Mitteis opened the twentieth-century controversy by an attack on the Huschkeian theory, which met with great success; but the new theory, quite distinct from Niebuhr's, which he suggested in its place, appears to have found few if any supporters.²³

Of those who accept Mitteis's negative argument against Huschke, Mommsen reiterates the old alternative of Niebuhr, while the others, e.g., Lenel, Stintzing, and Pflüger, solve the problem in a totally novel way. But others again, e.g., Bekker, Kübler, Senn, Girard, Eisele, still cling to the Huschkeian view. Consideration of space will oblige me to refer very briefly to the highly original hypotheses of Schlossmann.

Let us first understand the nineteenth-century solutions. According to Niebuhr the borrower sold himself by a mancipation in the usual form to the lender, the sale being subject to two conditions which made it substantially a pledge, a suspensive condition—the mancipation was not to take effect till default in payment, and a resolutive condition—*dum solveret*, the mancipation is destroyed by payment. This transaction is called *nexum*, and the debtor thus conditionally the property of the creditor is called *nexus*.

Besides the analogy of the German self-sale there is much that favours this view. In the first place a certain *a priori* plausibility. We start with sale as an ultimate conception, and we derive from it a transaction whose operation is in

²² Stintzing, *Nexum Mancipiumque und Mancipatio*, p. 7, n. 4, and p. 8, n. 1, cites Brinz, *Pandekten*, 2, p. 12; Kuntze, *Cursus*, s. 138, and *Obligationen*, s. 5; Horten, *Personalexekution*, 2, pp. 18 ff.

²³ Cp. Costa, *Diritto Romano Privato*, p. 332, n. 2. In chronological order: Mitteis, *ZSS*, 22, pp. 96 ff.; Roby, *Private Law*, 2, pp. 296 ff. (Cambridge, 1902); Bekker, *ZSS*, 23, pp. 11 ff., 429-30; Lenel, *ibid.*, pp. 84 ff.; Mommsen, *ibid.*, pp. 348 ff.; Naber, *Mnemosyne*, 31, pp. 214-16; Schlossmann, *Alt Römisches Schuldrecht*, &c. (Leipzig, 1904); Kübler, *Wochenschr. f. klass. Philol.* 1904 pp. 175-83, 206-12; Schlossmann, *Nexum* (Leipzig, 1904); Kübler, *Wochenschr. f. klass. Philol.* 1904, pp. 764-72; Kübler, *ZSS*, 25, pp. 254 ff.; Mitteis, *ibid.*, pp. 282-3; Kleineidam, *Die Personalexekution der Zwölftafeln* (Breslau, 1904); Huvelin, *Nexum ou Nexus*. *Daremberg-Saglio*; Senn, *N. R. H.*, 1905, pp. 49 ff.; Swoboda, *ZSS*, 26, pp. 219 ff.; Stintzing, *Nexum Mancipiumque und Mancipatio* (Leipzig, 1907); Mitteis, *Römisches Privatrecht*, 1, pp. 136 ff. (Leipzig, 1908); Pflüger, *Nexum und Mancipium* (Leipzig, 1908); Kretschmar, *ZSS*, 29, pp. 227 ff.; *ZSS*, 30, pp. 62 ff.; Bekker, *ZSS*, 30, pp. 30 ff.; Girard, *Manuel*, pp. 478 ff. (Paris, 1911); Eisele, *Studien zur röm. Rechtsgeschichte* (Tübingen, 1912). Pacchioni, *Mélanges* (Girard, 2, pp. 319 ff. (Paris, 1912). came to my notice too late to affect this lecture.

personam only because the person is treated as a thing; an intelligible transition from conveyance to contract. And secondly, if *nexum* was a modified mancipation, we can understand why later speech made *nexum* synonymous with mancipation.

Against such arguments must be set the weighty objections of Savigny,²⁴ that a self-mancipation is entirely unknown to Roman law; that a conditional mancipation is against all principle; and that the supposition of a *fiducia* or trust imposed upon the creditor is of no assistance, since the person presumably entitled to enforce it, i.e., the debtor, would be in the creditor's power, in whom therefore his right of action would be merged.

The difficulty of appreciating the force of these objections is that we do not know how far they existed at the time when Niebuhr's self-mancipation would have flourished. They are true of classical law, and it must be said that they look more like an inheritance from formalistic times than a creation of classical law.

A much stronger objection, to my mind, has been urged by several authors in the recent controversy, namely that if *nexum* was a *mancipatio*, its release should be a *remancipatio*. Now *nexi liberatio* must be identified with the *solutio per aes et libram* of Gaius, and this was not a *remancipatio* at all. Again, the identification of *nexum* with *mancipatio* is contrary to the opinion of Mucius in the Varro passage, according to the best interpretation for what it is worth.

Niebuhr was an historian, and the objections to him are juristic. Let us see if the jurist Huschke fares better.

In his view *nexum* covers every debt arising *p. a. et l.*, including a loan so contracted. This loan took the form of a weighing of the metal to be lent, before *libripens* and witnesses, accompanied by a formula spoken by the creditor in which he declared the debtor *damnas* to repay him. These *nexum* debts were precisely equivalent, so far as they were liquidated, to a judgment debt (*indicatum*), and were therefore enforceable by the creditor without judgment on the person of the debtor by *manus iniectio*. They stood to *indicatum* as *mancipatio* to *in iure cessio*.

In support of this view he urged the constant juxtaposition of *nexi* and *indicati* in the historians; the form of re-

²⁴ Vermischte Schriften, 2, pp. 396 ff.

lease which, according to Gaius, was the same for a *indicatum* as for a debt incurred *p. a. et l.*, and the doubling of the condemnation in later times against a defendant who denied liability in the actions on a *legatum per damnationem* and a mancipatory warranty, just as in the *actio indicati*. This doubling, he contends, is derived from the doubling against a *vindex* in a *m. i.*, which was the common process for enforcing all these debts in early days.

The formula of release for the principal case of *nexum*-loan is not given by Gaius, but from that which he gives for *l. p. d.* there is reason to infer that the release of a *nexum*-loan recited a *damnatio* by the creditor, and this *damnatio*, it must be inferred, was an essential part of the formula of binding uttered by the creditor at the making of the loan. Now, according to Huschke, *damnas esto* was the regular term in statutes, as in wills and in judgments, for declaring a debt enforceable by *m. i.* The chief argument for this view is the formula of *m. i.* given by Gaius 4, 21, which recites "*quod tu mihi indicatus sive damnatus es*," &c.

But the best remembered, though to my mind the least valuable, part of Huschke's argument, is his description of the *nexum*-loan as publicistic. He explains its peculiarly stringent effect by the consideration of the public nature of the transaction *p. a. et l.*—a weighing of metal as money by a *libripens* before five witnesses. These witnesses, according to his view, represent the five Servian classes, that is, the Roman people. The weighing is a public function, the creation of money, the state measure of value. The right acquired by *nexum* is acquired by the creditor in a public capacity as *pars populi*, and has the sanctity of a debt created by the authority of the State. After the introduction of coinage the weighing became symbolic, it was done once for all by the mint; but *nexum* did not at once lose its old effects.

III. THE TWENTIETH-CENTURY SOLUTIONS.

The view found in possession by Mitteis was not the Huschkeian view in its original form, as I have just sketched it. The revised versions varied, and therefore perhaps Mitteis was justified in attacking the original version. But the result of this procedure was that some of his arguments had been anticipated. However, for the moment, I will deal with the new solutions on their positive side.

According to Mitteis,²⁵ Huschke and Niebuhr were both wrong in deriving the right to seize the debtor from the nature of the *nexum-loan*. This was a contract in the modern sense, enforceable by *legis aº. sacramento in personam*. The condition of debtor-bondage, of a *nexis* in short, arose from a second transaction, also called *nexum* and also *p. a. et l.*, which, if we will be taught by comparative law, can only have been a self-mancipation with immediate effect though defeasible on payment. By it the creditor got a right of ownership in his debtor, and the debtor avoided the terrible consequences of allowing himself to become *indicatus*.

The novel feature of this theory is the gap which it leaves between the loan and the bondage. Both Huschke and Niebuhr join the two together; the bondage is implicit in the nature of the loan itself; and thus Mitteis stands as far from Niebuhr as from Huschke, and the self-mancipations of Niebuhr and Mitteis are not a point of agreement. In fact Mitteis's conception of the loan itself is nearer to Huschke's than to Niebuhr's.

What is this wedge which Mitteis drives between the *nexum-loan* and bondage? I cannot resume all his arguments, but they amount to this, that Livy in describing the entry into bondage sometimes uses the phrases *nexum se dare*, *nexum inire*, and the like, and these point to a fresh act consummating a debtor's ruin, rather than to a regular enforcement of a bondage flowing *ipso iure* from the loan. There is a debt, and there follows *nexum inire*. Mitteis says this *nexum inire* means a second transaction by way of self-mancipation, while Huschke, and for that matter Niebuhr, says that it refers simply to the *de facto* beginning of bondage.

Philologically Mitteis's is the better interpretation of the phrases, but I believe that careful examination will reduce the relevant passages of Livy to a single one, and I do not admit that the description of *nexus* in Varro, at the end of the passage quoted above (p. 139), is at all decisive. It says the *nexus* "*dabat operas*," and, waiving the fact that "*dabat*" is a conjecture, we have no right to deduce from this phrase a technical *datio* in the sense of a conveyance. The man

²⁵ Mitteis, ZSS. 22, pp. 96 ff.

In his first article Mitteis was willing to concede that the self-mancipation might occasionally accompany the loan, and in such case be suspensively conditioned till default, as well as resolutely: ZSS. 22, pp. 122-3. But he revoked this concession in 1904: ZSS. 25, pp. 282-3.

"rendered his services"; that is all. If indeed we accept Mommsen's tempting emendations *id aes* (MS. *idem*) and *ut ab aere obseratus* (MS. *obaeratus*), the passage tells the other way. The man is put in bonds by the *nexum aes*, which is the money lent (*pecunia quae per nexum obligatur*), and there is thus a direct connection between the loan and the bondage.

The passages of Livy cited by Mitteis as inconsistent with Huschke's doctrine, and we may add with Niebuhr's, are Livy 2, 24, 6 (cf. Dion. 6, 26, 1 and 6, 29, 1); 8, 28, 2 (cp. Val. Max. 6, 1, 9); and 7, 19, 5.

Livy 2, 24, 6 (edict of Servilius 495 B.C.) "*ne quis civem Romanum vinctum aut clausum teneret quominus ei nominis edendi apud consules potestas fieret, neu quis militis donec in castris esset bona possideret aut venderet, liberos nepotæve eius moraretur.*" Huschke²⁶ explained this and the companion passages of Dionysius by the hypothesis that execution on *nexum*-loan included those in the debtor's *potestas*. In that case, asks Mitteis, how are we to explain Livy 8, 28, 2, "*L. papirius is fuit; cui oum se C. Publilius ob aes alienum paternum nexum dedisset,*" &c., and Val. Max. 6, 1, 9, "*T. Veturius . . . cum propter domesticam ruinam et grave aes alienum C. Plotio nexum se dare admodum adolescentulus coactus esset,*" &c.? If the son was bound by the father's *nexum*, why force him *nexum se dare*? The phrase *nexum se dare* must denote a fresh legal act, not the *de facto* beginning of bondage as Huschke²⁷ would have it.

In further confirmation of Mitteis, Livy 7, 19, 5, "*Nam etsi unciario fenore facto levata usura esset, sorte ipsa obruebantur inopes nexumque inibant.*" Here *nexum inire* cannot be the execution of existing debts, but must be a transaction consequent on previous debts.

But the difficulty about sons is easily surmountable. There is no need to suppose that the *nexum*-loan bound the sons *ipso iure*. The supposition that a father might on occasion mancipate his children by way of further security sufficiently accounts for the infrequent notices of their seizure. Bekker²⁸ and Mommsen,²⁹ it is true, both preserve Huschke's doctrine that the sons were bound by the father's *nexum*. Bekker sug-

²⁶ *Nexum*, p. 61, n. 67.

²⁷ See the preceding note.

²⁸ ZSS. 23, p. 17.

²⁹ ZSS. 23, p. 350.

gests that the father's debts were not *nexum*-debts, but I feel that we are bound to assume that they arose out of loans, and loans, naturally, by way of *nexum*. Mommsen thinks that the creditor may have had the kindness to renew with the sons the *nexum* of the father, though they were already fully bound by it. But why should he? It is easier to suppose that the *nexum*-debt did not descend, at least with full force, upon the *heres*.

Livy 7, 19, 5, however, remains independent of these explanations. The people were first crushed by loans, and then *nexum inibant*. *Nexum inire*, says Mitteis, must be taken as *contractum inire*; it cannot mean the *de facto* entry into bondage, as Huschke contended.³⁰ The explanation of Mommsen³¹ and Kubler,³² that the previous debts were in some milder form (presumably *sponsio*, not *mutuum*, as there is interest), does not satisfy. It is better to recall the fact that the modern Huschkeian position does involve a definite act of submission to bondage by the *nexum*-debtor. The *m. i.* provided by the Twelve Tables for *iudicati* terminates in death or sale *trans Tiberim*.³³ Why, then, if *nexi* and *iudicati* are not essentially distinguished, do *nexi* appear in the historians as kept in permanent bondage? How is it that Livy, who does not spare our sensibilities, gives us no example of the extreme penalties being inflicted either on *iudicati* or on *nexi*?³⁴ We can only suppose that a conventional substitute, under the *ius paciscendi cum creditore* (Twelve Tables, 3, 5), took their place in practice. Such *pacta* may even have become obligatory, just as *pacta* in composition of delicts became obligatory in the shape of the early penal actions.³⁵

On this shewing the inconsistency of Livy 7, 19, 5 with the Huschkeian view is not more than verbal. Livy describes as *nexum*, in this one passage, the *pactum* which led to the characteristic result of *nexum*.

Another passage sometimes quoted against Huschke creates no difficulty at all (Livy 2, 23, 5, 6). A centurian complains, "*Aes alienum fecisse. Id cumulatam usuris primo se agro paterno avitque exuisse, deinde fortunis aliis. Postremo*

³⁰ *Nexum*, p. 61, n. 67.

³¹ ZSS. 23, p. 350.

³² ZSS. 25, p. 276.

³³ Twelve Tables, 3; Aul. Gell. 20, 1, 42 ff., 15, 13, 11; Schlossmann, Schuldrecht, &c., pp. 61 ff.; Kleineidam, Personalexecution, pp. 244 ff.

³⁴ Cp. Aul. Gell. 20, 1, 48-52.

³⁵ Bekker, ZSS. 23, 16; Kleineidam, *op. cit.*, pp. 56 ff., 74.

velut tabem pervenisse ad corpus: ductum se ab creditoribus non in servitium set in ergastulum et carnificinam esse." Naturally a man would sell his last acre and part with his last shilling before submitting to bondage. The historians in depicting economic ruin dwell by preference on the last and most drastic stages of debt, and are comparatively silent about the earlier and less drastic.

Mitteis also cites passages from Dionysius, but I am so convinced that Dionysius directly supports the Huschkeian view, that I will reserve till later the consideration of his evidence, for what it may be worth.

One passage of Livy (7, 19, 5), if I am right, two or three more if I am wrong, seem an insufficient basis from which to infer juristic details to which there are strong objections.

The objections are indeed strong. The proposition of two distinct *nexa*, a *nexum*-loan and a *nexum* creating bondage, is a paradox imposing a heavy burden of proof. Mommsen²⁶ at once pointed out that Mucius's opinion in the Varro-passage proves the identity of *nexum* with a contract of loan; that no *aes* remains to be weighed in the supposed second transaction; that the second *nexum* is unnecessary, since the desired effects can equally well be attributed to the first; and that the passages of the historians admit of a different interpretation from Mitteis's. On the positive side Mommsen, in cryptic and guarded language, declared himself for Niebuhr's old theory.

These objections to Mitteis seem decisive; the doctrine of two *nexa* has been refuted, so far as refutation is possible in this sphere. But it led to an interesting development. Lenel,²⁷ while accepting Mitteis's doctrine of two stages, the incurring of the debt and the contracting of bondage, rejects that of two *nexa*; for him the first stage, the loan, is not *nexum* at all. The second stage, the *nexum inire*, *nexum se dare*, of Livy is the only *nexum* in this connexion, but it has nothing to do with the *nexum* of the Twelve Tables, of Manilius, Mucius, and the rest. It was not a self-mancipation, which, with Savigny, Lenel holds to be impossible, but most probably a *vadimonium*. This remarkable suggestion is arrived at as follows. The earliest debts were penalties for delicts, and a man unable to pay them found *vades*. Later he was his own *vas*, and thus a way of creating liability by contract arose. The total disappearance of the *vadimonio nexus* is due to the abolition of bondage by the *Lex Poetelia*.

²⁶ ZSS. 23, pp. 348 ff.

²⁷ ZSS. 23, pp. 84 ff.

We cannot say that such an evolution is impossible, since it would be an exact parallel to the German *radiation*, and the *praes* of later publicistic law is to some extent analogous. But a *vadimonium* outside the law of procedure is unsupported by any Roman evidence.³⁸ What is the force of comparative law in such circumstances? Its real function seems to be to enable us to understand the native evidence when we are moving in a region of unfamiliar because primitive ideas. But the native evidence, when so understood, must prove its own case. The same analogy has been applied with much greater probability by Mitteis to *sponsio*.³⁹

Pflüger,⁴⁰ therefore, who follows Lenel in denying that the loan was a *nexum*, returns to Scheurl's⁴¹ old doctrine of mancipation of *operae* for the form of the *nexum* creating bondage.

Thus those who accept Mitteis's doctrine of two transactions, a loan and a creation of bondage, will not accept his two *nexa*; but whereas the older writers had never heard of the second *nexum*, the younger school proposes to abolish the first. And this is the logical outcome of the new speculation, for Mitteis's position is evidently a compromise.

Can this denial of the existence of *nexum*-loan be justified? If not, we are thrown back upon the old choice between Niebuhr and Huschke.

Lenel⁴² brought two arguments against the existence of a *nexum* in the sense of a loan *per aes et libram*.

1. The identification of *nexum* with *mancipium* in the Twelve Tables phrase, "*ubi nexum faciet mancipiumque*." He argued that the suffix *-que* instead of *-ve* shews that *nexum mancipiumque* represent one transaction. But, as Kubler and Kleineidam⁴³ simultaneously pointed out, *-que* and *-ve* are so constantly confused in manuscripts and inscriptions that there is no presumption for *-que* in the original text. But, admitting *-que*, there are other passages in the Twelve Tables where *-que* is disjunctive, not conjunctive.

2. In later speech *nexum* means *omne quod per aes et libram geritur*, or more narrowly *mancipatio*. To this argument there are two answers: first, that it takes no account of

³⁸ Debray, N. R. H. 1910. pp. 521 ff.

³⁹ Mitteis, ZSS. 22, p. 97; Festschrift f. Bekker (1907), pp. 100 ff.; Privatrecht, 1, pp. 266 ff.

⁴⁰ Pflüger, *Nexum und Mancipium* (Leipzig, 1908).

⁴¹ Scheurl, *Vom Nexum*, 1839, cited by Pflüger, p. 97, n. 187.

⁴² ZSS. 23, pp. 84 ff.

⁴³ Kübler, ZSS. 25, pp. 254 ff.; Kleineidam, *Personalexekution*.

Mucius's weighty dissent in the Varro-passage, and secondly, that the later identification, by Cicero and others, of *nexum* with *mancipium* is not a technical usage, but a popular usage centuries after the *Lex Poetelia*. These two points need development.

Mucius, Lenel admits, dissented from the current view, "*nexum est omne quod per aes et libram geritur*," but he must be understood to have said that *nexum* denotes what is contained in an act *per aes et libram* in addition to (*praeter quam* [*quod*] *mancipio detur*) the *mancipium* or laying hold of the thing, in fact that it is that part of the transaction which creates an obligation. Thus Mucius suggests that *nexum* refers to the obligatory side of a *mancipatio* (*actiones auctoritatis*, and *de modo agri*), *mancipium* to the conveyancing. And so it is that the phrase *nexum mancipiumque* in the Twelve Tables describes one single transaction. But Kubler and Kleineidam⁴⁴ have both shewn the superiority of the older interpretation: "*nexum* is, according to Manilius, every transaction *per aes et libram*, mancipations included; according to Mucius it refers (only) to acts *per aes et libram* of a (purely) obligatory character, excluding (therefore) mancipations." The pivot of this interpretation is that "*praeter quam*" (or *quom*) "*mancipio detur*" of Mucius, or perhaps Varro, must be antithetical to "*in quo sint mancipia*" of Manilius, or again perhaps Varro. Hence *praeter*, which in itself may be inclusive or exclusive, must here be used in its exclusive sense. But if we ask what acts *per aes et libram* other than mancipations Mucius can have meant, we can only answer loans.

It is Mitteis,⁴⁵ to whom the *nexum*-loan is an awkward fact, who has observed that a technical usage of the word *nexum* is only preserved in the phrases *nexum aes*, *nexi datio* and *nexi liberatio*. *Nexi datio* may refer to mancipation, but *nexum aes* is defined by Festus as "*pecunia quae per nexum obligatur*," and *nexi liberatio* (of Aelium Sallus in Festus) must be identical with the *solutio per aes et libram* of Gaius. It means freeing from *nexum*, not freeing by way of *nexum*.⁴⁶ As I have pointed out already, this *solutio* is the *contrarius actus* of a debt created by an act *per aes et libram* distinct from a *mancipatio*. Thus one, if not the only, technical usage

⁴⁴ See the preceding note.

⁴⁵ *Privatrecht*, 1, pp. 136 ff.

⁴⁶ Wissowa in Mitteis, *Privatrecht*, 1, 141, n. 16.

of *nexum* refers to debt. I conclude that *nexum*-loan exists, though I admit that the later popular usage of the term *nexum* creates a difficulty which has not yet been satisfactorily explained. Thus to my first definite conclusion, that Mitteis's two *nexa* are impossible, I add a second, that the one *nexum* that exists is the *nexum*-loan.

A complete account of modern views would include the theories of Schlossmann, Huvelin, Stintzing, and Kretschmar.⁴⁷ We must confine ourselves to a very brief mention of the highly original position of the first-named.

Like Lenel, he adopts Mitteis's argument against Huschke, and like Lenel he identifies *nexum* with *mancipium* in the Twelve Tables. But his conclusions are quite different. He emends and translates the opinion of Mucius reported by Varro (*supra*, p. 139) as follows: "Mucius says that the term *nexum* is applied to things that are bound *per aes et libram*, abstracting from the fact that they are also mancipated. This the word itself shews. For the same Mucius writes: that which is bound *per aes et libram* does not become really one's own (*neque suum*), whence *nexum*. A free man who was giving his services instead of money which he owed until he paid it was called *nexus* from *nectere*" (inserting a *nectendo*) "as *obaeratus* is derived from *aes*" (i.e., the *raudusculum* used in the mancipation).

This interpretation makes the passage, up to the last sentence, deal with the fiduciary mancipation of things; till practised in Mucius's day; and the last sentence with a disused fiduciary self-mancipation of persons. Similarly the Twelve Tables phrase *nexum Mancipiumque* refers to the fiduciary pledge of persons or things; *nexum*, according to Mucius, standing for the contractual and *mancipium* for the conveying element. When the *Lex Poetelia* killed *nexum Mancipiumque* of persons, *nexum Mancipiumque* of things became the general name for a transaction *per aes libram*. Person-*nexum* was enforced by personal action, judgment, and *m. i.*

According to this theory there is no such thing as a simple debt in primitive Roman Law.⁴⁸ A man may charge his pro-

⁴⁷ See the references, p. 8, n. 22. Huvelin combines a fiduciary mancipation with a *damnatio*. Stintzing identifies *nexum* with *mancipium*, but distinguishes *nexum Mancipiumque* from *mancipatio*. Kretschmar is for *nexum* a binding of *operae* enforceable by *legis actio sacramento in personam*. He gives an original interpretation of the Varro-passage.

⁴⁸ In this extreme form Schlossmann's doctrine is refuted by Kleineidam's citation of Twelve Tables 5, 9, in his *Personalexekution*, p. 89.

perty, or in the last resort his person, but not simply pledge his credit; and the charge on property involves no general personal liability.

One must admit that Schlossmann has called attention to an unduly neglected form of early debt, the fiduciary mancipation of things. But his theory of person-*nexum* is the real question here, and it is reached by an interpretation of Mucius which is at least as objectionable as Lenel's, and involves, moreover, unnecessary emendations. In short, here also the refutations of Kubler and Kleineidam⁴⁹ seem complete, and we have also to remember the difficulties involved by every theory of self-mancipation.

IV. NIEBUHR OR HUSCHKE.

We are thrown back upon the old question: what was the exact form of this loan, and how did it lead to bondage? We are faced with the old alternative: Niebuhr or Huschke.

I have already stated⁵⁰ that the objections of Niebuhr's view are almost insuperable. Still, they must be balanced against the objections, old and new, which Mitteis urges against Huschke. These have been dealt with in detail recently by Eisele.⁵¹ I must content myself here with the most important.

1. Huschke had argued of *nexum*, because publicistic therefore executable by *m. i.* Mitteis⁵² complains that the conception "publicistic" is cloudy and ungrounded, and one can only agree. If indeed *nexum* can be shewn *aliunde* to have been executable by *m. i.*, the adjective "publicistic" is not altogether inappropriate, but in any case it serves no good purpose.

2. That *nexum* is executable by *m. i.* is precisely what Mitteis⁵³ denies can be shewn. In fact he argues the contrary, from comparative law, from Gaius's treatment of *m. i.*, and from the historians.

(a) *Comparative law*, it is urged, offers no examples of contracts directly executable on the person, but many examples of contracts by way of self-sale or self-pledge. This leads us to look for the self-sale in the Roman evidence, but it cannot

⁴⁹ *Supra*, p. 147, n. 2.

⁵⁰ *Supra*, p. 141.

⁵¹ *Studien zur röm. Rechtsgeschichte* (Tübingen, 1912).

⁵² *ZSS.* 22, pp. 100-3; Eisele, *Studien*, pp. 1-8.

⁵³ Mitteis, *op. cit.*, p. 104.

impose a Roman self-sale upon us *a priori* and against powerful native objections, and, as we have said, there is no trace of such an institution in Roman Law, and it seems against principle.⁵⁴

Kubler,⁵⁵ indeed, has raised the question whether comparative law speaks so decidedly as Mitteis contends. He points out that the Greek contracts with execution clauses, in the form *tes tes práxeos öuses ëk te emou* (the debtor) *kai ek tón huparchóntôn moi pántôn kathaper ek díkes*, frequently found in the papyri, created a right of execution against the person of the debtor without judgment. And Mitteis himself has abandoned his older view⁵⁶ that these clauses created no such right. But it remains to be seen whether such contracts are at all primitive in the Greek world, and not the product of somewhat advanced commercial needs. At any rate this consideration makes Roby's citation⁵⁷ of our own *cognovit actionem* irrelevant.

(b) The second objection⁵⁸ to Huschke's is Gaius's treatment of *m. i.* Not merely is he silent about *m. i.* on *nexum*, but he treats it as in origin *iudicati* and in its extensions *pro iudicato*. We answer that it is one thing to contradict Gaius, another to doubt his implied conceptions of legal history. Huschke, like Gaius, seems to have regarded *m. i.* as primarily *iudicato*, in which case *nexum* ought to have appeared as a case of *m. i. pro iudicato*. But this is precisely a point on which comparative law has changed our whole view. As long ago as 1871 Bekker in his *Aktionem*⁵⁹ pointed out that *m. i.* is the oldest *legis aº.*, and consequently there must have been a time when there was *m. i.* without any possible judgment to enforce. What debts, other than judgment debts, could *m. i.* have enforced? Delictual penalties, probably; *nexum*-debts, possibly. *Nexum* grounded *m. i.* because *m. i.* was the ordinary way of enforcing a debt, not because it was given the privilege of being enforced like a *iudicatum, pro iudicato*. *M. i. pro iudicato* is the conception of a later age, when *m. i. iudicati* had become the type, and execution of a debt without judg-

⁵⁴ *Supra*, p. 141.

⁵⁵ Kubler, ZSS. 25, pp. 276 ff. Swoboda, ZSS. 26, pp. 210 ff.; Pflüger, *Nexum und Mancipium*, pp. 80 ff.; Mitteis, ZSS. 29, p. 501; Mitteis-Wilcken, *Papyruskunde* (1912), 2, 1, 121.

⁵⁶ *Reichsrecht u. Volksrecht*, pp. 419 ff.

⁵⁷ *Private Law*, 2, p. 308.

⁵⁸ Mitteis, *op. cit.*, pp. 105-6.

⁵⁹ *Aktionen*, 1, pp. 18 ff.; cp. ZSS. 23, pp. 11 ff.; 30, pp. 15, 18-19.

ment an exception. So much for Gaius's general treatment. As to his silence, that no doubt is odd, but, on the other hand, what explanation can the objectors give of the alternative formula in Gaius 4, 21 of *m. i. iudicati* quoted above—"quod tu mihi iudicatus sive damnatus es," &c.? What is this unexplained contrast between *iudicatus* and *damnatus*?⁶⁰ It seems to me that Mitteis's argument on this point has little application to Bekker's revised version of Huschke, which is substantially that of most modern text-books, such as Girard's *Manuel*.⁶¹

(c) I pass over the objection based on Livy's phrases *nexum se dare*, *nexum inire*, as already disposed of. We have seen that it leads either to two *nexa*, or no *nexum*-loan, both impossible conclusions.

(d) Certain other objections are of rather too detailed a character to be dealt with at length.⁶² They are aimed at the inclusion of the *actio auctoritatis*, the *actio de modo agri*, and the *legatum per damnationem* in the conception *nexum*, so as to corroborate the Huschkeian theory of *nexum*-loan. Besides being liabilities incurred *per aes et libram* and releasable by *solutio per aes et libram*, they were all supposed to have a *lis crescens in duplum adversus infitiantem*, and this was held to be a relic of the *lis crescens* against the *vindex* in *m. i.*, and so to prove original enforceability by *m. i.* Mitteis observes that it has long been agreed that the *actiones auctoritatis* and *de modo agri* had not a *lis crescens*, but were *ab initio in duplum*. One might add that they were not debts arising *per aes et libram* so much as penalties imposed, presumably by some statute, upon abuses of that ceremony.⁶³

The connexion of the *legatum p. d.*, which really had a *lis crescens*, with *nexum* does not disappear so easily. But this is because it has other certain points of similarity, such as that it is releasable *per aes et libram*. Eisele's defence of the argument from the *lis crescens*⁶⁴ is not convincing; at most he makes a drawn battle with Mitteis, and after all the burden of proof is on him. But to enter into the various arguments would take us too far afield.

⁶⁰ See Eisele, *Studien*, pp. 32, 41, and other authors. *Contra*, Wlassak, *ZSS*, 25, p. 176.

⁶¹ *Manuel*, p. 983.

⁶² Mitteis, *op. cit.*, pp. 111 ff.

⁶³ Senn, *N. R. H.* 1905, pp. 66 ff., citing Girard, *N. R. H.* 1882, pp. 180 ff.

⁶⁴ Eisele, *Studien*, pp. 36 ff.

One unexpected result, however, of Mitteis's objection is to make it more difficult to understand as the original debts released by Gaius's *solutio per aes et libram* these *actiones auctoritatis* and *de modo agri*. Thus our belief in *nexum*-loan as the original subject of release is necessarily strengthened.

(e) I must mention one final objection which Mitteis does make good.⁶⁵ Huschke certainly attributed a magic effect to the words *damnas esto* uttered by the creditor in the *nexum*-loan; Bekker, on the contrary, regards it simply as a phrase imposing liability which happens to date back to a time when *m. i.* was the only way of enforcing a liability. Girard, who maintains the argument from *lis crescens*, holds that the phrase kept its force at a later date; for instance that the words *damnas esto* in the *Lex Aquilia* imposed originally a liability enforceably by *m. i.*, and thus he explains the doubling of damages by that *lex* against a defendant who denied liability.⁶⁶ But Mitteis seems to me to have shewn that, apart from the *lis crescens*, there is no real evidence that *damnas esto* had this effect except in the earliest time, and, as observed above, the argument from *lis crescens* is itself very doubtful.

It will be said, if we give up these arguments, what evidence is there to connect an earlier *damnatio*, such as occurred in *nexum*, with *m. i.*? It is not enough to make such a connexion unobjectionable by revising the history of the *legis actiones* in the light of comparative law. Some positive support must be found in the native material.

There seems to be two indications of such a connexion:

(1) The whole treatment of Dionysius.

A perusal of the passages of Dionysius set out by Kleineidam,⁶⁷ in the light of what we now know about Greek law (*supra*, p. 150), leaves no doubt that he had in mind money loans expressly providing for execution on the person of the debtor without judgment. The clearest phrases are perhaps *daneizein epi somasin* (4, 9), *medemian eispraxin einai mete sumbolaou medenòs mete katadíkēs medemiās* (4, 11), (4, 10), and the famous threefold division in 6, 83. But to Dio-

⁶⁵ Huschke, *Nexum*, pp. 50 ff.; Bekker, *Atkionen*. 1. 24; ZSS. 30, 14 ff., 30 ff.; Mitteis, ZSS. 22, 1, c.; Girard, *Manuel*, pp. 481-2 (notes); Eisele, *Studien*, pp. 30 ff.

⁶⁶ Girard, *Manuel*, pp. 480-1.

⁶⁷ *Supra*, v. 138, n. 2.

nysius's evidence Pflüger⁷⁰ makes the very pertinent objection that we have to allow for a possible importation of Greek ideas. Dionysius may also have been influenced by the early history of Attica, where the practice of *daneizein epi somasin* aggravated the debtor-question till Solon's reforms.⁷¹ The hellenization of early Roman history is a fault of even Roman writers, and Dionysius was a Greek writing in Greek. Pflüger's caution against implicit confidence in Dionysius is therefore fully justified.

(2) Besides the evidence of Dionysius we have the fact that both *nexum* and *iudicatum*, not to mention the *legatum p. d.*, were releasable in the same way, by *solutio per aes et libram*. Since between *nexum* and *iudicatum* there is no connexion in point of form, their common feature must have been their effects, and the effect of *iudicatum* is known to have been *m. i.*⁷²

V. SUMMARY.

I sum up my results as follows:—

1. The new theories of two *nexa*, or of no *nexum*-loan, present unsurmountable difficulties, and are based only on one or a few more passages of Livy.

2. The theory of self-mancipation is juristically objectionable.

3. The revised theory of *nexum* leading to *m. i.* has no serious objections to meet; but on the other hand, it leaves something to be desired in the matter of positive proof.

In conclusion, I ought to say that modern authority, and doubtless older authority also, might have been quoted for practically every argument adduced in this paper. I have not thought it worth while to do so, partly because many arguments are current coin and partly because of the considerations of space. The position here adopted is that of Bekker and Kubler, and with small variations that of Girard, Senn, and Eisele, all of whose contributions I freely utilized.

F. DE ZULUETA.

⁷⁰ *Op. cit.*, pp. 83 ff.

⁷¹ Plut. Solon, c. 13, 15; Ath. Pol., c. 6, cited by Pflüger.

⁷² An old argument, but put in this pointed manner by Eisele, Studien, -p. 36.

PERSONAL.

The City Council of Windsor has appointed Mr. F. D. Davis, a well-known local barrister, and member of the Essex County Bar, to the position of City Solicitor.

Twenty-eight newly fledged young barristers, including one lady, Miss Jean Cairns, of Huntsville, were called to the bar and sworn in as solicitors before Mr. Justice Middleton at Osgoode Hall, recently. They were introduced by Mr. G. T. Shepley, Acting Treasurer of the Law Society, and Mr. Bell, the Secretary, was also present.

The new lawyers are:—H. L. Slaght, J. W. Pickup (with honours and gold medal), F. G. Dyke (with honours and bronze medal), D. R. M. Leask, G. C. McCulloch, H. E. Wallace, A. E. Parkinson, Stewart Cowan, J. H. Bone, J. A. E. Braden, R. H. G. Ivey, G. M. Miller (with honours), H. R. Moses, J. M. Murdoch, W. F. Schwenger, W. A. Dillon, E. D. O'Flynn, W. K. Fraser (with honours), D. A. Macdonald, Ephraim Sugarman, W. H. Cook, G. M. Willoughby, A. L. Brady, C. S. McGaughey, J. H. McDonald, J. J. Greenan, Miss Jean Cairns, A. C. Bell.

Owen Ritchie, of the well-known firm of barristers, Cowan, Ritchie and Grant, died of heart failure, aged 48. The deceased was born in Rothsay, N.B., son of Wm. J. Ritchie. He was educated at Bishop's College, Lennoxville, Que., and called to the Ontario Bar in 1889, practicing in Ottawa 1889-1912, when he was called to the British Columbia Bar and joined with the present firm.

The Intermediate and Final Law Examinations of the N. S. Barristers' Society were held at the Supreme Court House last week, before J. Barnhill, examiner. They began on Tuesday morning and finished on Saturday. Those who took them were:—Intermediate: John E. Read, Halifax; N. Ellis, North Sydney. Finals: M. A. McPherson, H. C. Morse, and J. E. Read, Halifax; Murray McLeod, North Sydney. There were no entries for the preliminary examination.

Under the terms of the Act of Parliament passed last session compelling the retirement of County Court Judges at

the age of 75 years, no less than seven Ontario Judges will be superannuated this autumn. They are: Judge McCarthy, of Dufferin; Judge Price, of Frontenac; Judge Senkler, of Lanark; Judge Robb, of Norfolk; Judge Chisholm, of Waterloo; Judge McCurry, of Parry Sound, and Judge Morgan, of York.

Many demands are being made in connection with these vacancies, as well as those to be created in the High Court of Ontario by the approaching retirement of Sir John Boyd and Judge Britton. A. L. Lancaster, M.P., Lincoln, and A. C. Boyce, M.P., West Algoma, are said to have been promised the two High Court vacancies, while O. S. Crockett, member for York, will be appointed to the Supreme Court of New Brunswick.

After an illness of one week, Mr. Reginald Boulton, retired barrister, died at his home, aged 52 years. The funeral took place to St. James' Cemetery.

C. M. Foley, of the law firm of W. S. Ball, Lethbridge, has been sworn in as a member of the Alberta Bar.

M. D. McCrimmon, St. Thomas, who has had charge of J. M. Duncan's law practice during the latter's absence from the city, will open an office on Talbot street, east of the Pere Marquette tracks.

Mr. William A. Henderson, late of the legal firm of Robinette, Godfrey, Phelan and Henderson, and Mr. Austin G. Ross, late of the legal firm of Beatty, Blackstock, Fasken, Cowan and Chadwick, beg to announce that they have formed a partnership under the name of Henderson and Ross and have opened offices in rooms 201 and 202 Stair Building, 123 Bay Street, Toronto.

James Morrison Glenn, K.C., LL.B., police magistrate of St. Thomas for the past twelve years, and one of the leading and best known legal men in Canada, died at his home, No. 39 Wellington Street. Mr. Glenn had been ailing for years with creeping paralysis, but it was only during the last few months that he had been forced to remain away from his office. Since then he had spent some time at

Battle Creek in an endeavour to regain his health, but, like his trip to Europe in the summer of 1910, he secured little or no benefit. His end was peaceful.

By the death of Mr. Owen Ritchie, of the legal firm of Cowan, Ritchie & Grant, at his residence, 1168 Nelson Street, the profession in Vancouver has lost a member who was a credit to the body. Mr. Ritchie expired suddenly and an inquest was held, the jury returning a verdict that death was due to heart failure. Although he only came to Vancouver eighteen months ago, during that time he gathered around him a large circle of friends and his demise will be received by them with the greatest sorrow. He conducted many cases for his firm in the local Courts, the most notable probably being that of the injunction proceedings instituted by the Silica Sand Company concerning Spanish banks. He was the son of the late Sir William J. Ritchie, formerly Chief Justice of the Supreme Court of Canada. Educated at the University of Toronto, he afterwards studied law and was called to the Toronto Bar. When he came here he qualified to practice as a British Columbia barrister. Interment took place at Ottawa, to which city the remains were shipped.

Mr. George Tate Blackstock, K.C., Mr. Thomas Percy Galt, K.C., Mr. Ross Gooderham and Mr. George E. McCann have severed their connection with the old established law firm of Beatty, Blackstock & Company, and formed a partnership.

Mr. David Fasken is now senior partner in the firm of Beatty, Blackstock & Company, which also includes Messrs. M. K. Cowan, K.C., Alex. Fasken, Hugh E. Rose, K.C., E. M. Chadwick, K.C., and Arthur Armstrong. The company was founded over sixty years ago.

A wire was received at Prince Albert from Banff, Alta., announcing the death of Judge F. F. Forbes of this city. Judge Forbes had been in very indifferent health for some considerable time, and had left the city with the intention of spending a holiday at the coast. At Loggan he had an acute attack of the illness from which he was suffering and he returned to Banff, where he rapidly got worse, death

taking place early next morning. Gordon Forbes, one of his sons, went to Banff and the body was brought to Prince Albert for interment.

Charles A. Russell, B.A., for the past three years a law student with the firm of Emery, Newell, Ford, Bolton and Mount of Edmonton, was the guest of honor at a complimentary banquet given in the Royal George hotel. Mr. Russell left the city for Wetaskiwin, where he will be associated with W. H. Odell in the practice of law.

Sutherland Cuddy, a Toronto barrister, has opened a law office at No. 1 Labelle Building, Windsor.

THE FEAR OF INVASION.

In a recent article in *The Independent*, Mr. Andrew Carnegie, in discussing "The Baseless Fear of War," attempts to shew the absurdity of taxing the people for military armaments under the pretext of averting a possible invasion. He says: "To name our probable invaders and describe their means of invading us would banish all ground for anxiety. Think of a European power having to transport an army and its supplies across the Atlantic to attack us, always keeping in mind the question why and with what object. . . . It would possibly be our best policy to invite our invaders to land; guide them into the interior as far as they would go—getting in they would find easy, but when it came to the question how they would get out it would be another story, surrounded, as they would be, by hundreds of thousands of sharpshooters from every quarter of the compass.

"Our Republic, soon to number 100,000,000 of free and independent citizens, our men, old and young, ready with their rifles to do or die for their country if attacked, surely every man, even the narrow professional soldier in his sane moments, must realize that no such hairbrained madness as invasion will ever be attempted. Our harbours could easily be torpedoed before the enemy could prepare and arrive."

This sanguine and somewhat sanguinary view, although consoling to national pride, is naturally at variance with the

opinions of some of our military experts. For example: Captain Paul B. Malone, of the United States Navy, has written for the April *Century*, a sketch in which he shews that New York city, the key to the wealth, commerce, and industry of this country, could easily be captured by a foreign power before there was time to concentrate enough trained men there to protect it; and that this capture would cripple the nation more than the combined taking of Boston, San Francisco, and Washington.

He says: "In the Franco-German War, Germany mobilized and concentrated 320,000 men on the frontier of France in eighteen days, and twenty-one days after the issuance of the order for mobilization she had defeated the French in the battles of Wörth and Spicheren. With increased railroad facilities, she could concentrate to-day in much less time. Taking this as a standard of comparison, it is found that on the nineteenth day after the issuance of orders for mobilization, a first-class power, having gained control of the sea, could begin the debarkation of 100,000 men on the southern shores of Long Island.

"What could we do in nineteen days? We have in time of peace 35,000 regular mobile troops available within the United States. There are about 110,000 organized militia, making a total of about 145,000 men available for immediate action. It is not desirable to go into details, but in general it may be stated that to expand these troops to war strength and to supply the infantry alone with the necessary equipment would require more time than the enemy would permit us to take. Without waiting to equip or expand, we could in eighteen days dispose approximately 35,000 men for the defence of Boston, 75,000 for the defence of New York, and 35,000 for the defence of Washington.

"A threat against Boston and Washington would retain the troops in position for their defence, with the result that 75,000 partly trained and partly equipped men would meet 100,000 highly trained and perfectly equipped forces of the enemy.

"A landing with a view to operations against New York may be made in Massachusetts or Connecticut, New Jersey, or Long Island. In the first case, New York might be captured only after a long campaign; in the second, decisive results would be secured in a brief period; in the last case, the issue might be decided possibly in a single battle.

"Any force which attempted to defend the city by occupying it would be doomed to disaster. If defeated on Long Island, the troops must ultimately evacuate the city, as Washington did, retreat to the north, and continue to fight in the open, or submit to capture in an attempt to hold the city.

"Victory for the enemy on Long Island would mean the capture of New York, thus inflicting upon the United States the most serious blow it is possible to inflict in a single disaster. After the fall of New York, the capture of the forts at the mouth of the harbour would be an easy matter; the harbour thus opened to the enemy, the landing of troops and supplies might be conducted without molestation, and the campaign against the interior could be organized and started in less time than it would take us to expand our available troops to war strength and furnish them with the materials which are indispensable to their efficiency."

Invasion is improbable, but by no means impossible. Prudence would seem, therefore, to require that adequate plans of defence be outlined, and the means to make them effectual be matured. The game of war, as played in the twentieth century, with all the modern improvements in military art, would reach a crisis in so short a space as to leave little time for preparation.

We would rejoice to see law take the place of arms, and arbitration rule the destinies of nations, instead of military force, but until this be possible, it is well to observe the Puritanic motto, and "keep our powder dry."

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THE INDEBTEDNESS OF MODERN JURISPRUDENCE TO MEDIEVAL ITALIAN LAW.

How much the world owes to Italian genius and labours! For Italy is "the mother of us all." The lamp of civilization has been handed on from Rome to modern nations by Italian runners. By Italy learning was re-established and the fine arts revived; Italy is truly called "the mother of universities and the saviour of learning." European commerce was originally revived by Italy, after the flood of barbarian invasions of Europe had spent itself. By Italians Roman law was recovered from antiquity, adapted for use in later times, and forever implanted as a living force in our modern civilization.

These grand achievements were accomplished by a people labouring under perhaps the worst political handicap known to history. For over thirteen centuries prior to 1871 Italy never enjoyed any of the blessings of a political union, and was either a prey to foreign invaders or torn asunder by fratricidal wars. During these many centuries Italy was but "a geographical expression"—to use Metternich's illuminating description. Modern united Italy is very youthful: Italy is not yet fifty years old.¹ The exuberance of Italian patriotism in the recent war with Turkey bears witness to this youthfulness of modern Italy, which so ardently rejoiced in its opportunity to display national power.

The beginnings of Italian law—using the term "Italian" in its modern sense—start with the emergence of Italy as a separate country out of the fifth century ruins of the Roman Empire of the West, finally extinguished in 476. About a century later the Ostrogothic kingdom of Italy was destroyed by the splendid military exploits of Belisarius and Narses, generals of Justinian. Once more Italy and Rome, the ancient imperial capital, were united to the Empire.

¹ She celebrated her 40th birthday in 1911.

To the restored province of Italy, Justinian extended in 529 his code of laws²—the *Corpus Juris*, as this monumental sixth century codification of Roman law was later termed. Justinian himself re-established and reformed the law school at Rome³ in imitation of those at Constantinople and Beirut. For the next 500 years Roman law in its original form retained its hold in Italy.⁴ And there is one part of the Italian peninsula where this length of time should be increased to over 1,300 years: the twentieth century law of the tiny Appenine republic of San Marino⁵ is Roman law purely and simply.

Although three years after Justinian's death, the revived Roman imperial authority in Italy received a very serious blow in the coming of the Lombards⁶—the fiercest and rudest of all the Teutonic invaders — who settled in Northern Italy and gradually acquired the middle and southern portions of the peninsula, yet the dominion in Italy of the Roman Empire of the East did not entirely cease until nearly the twelfth century.⁷

When Rome fell back under the sway of the Teutonic invaders, the law school at Rome removed to Ravenna, the capital for nearly two centuries of the Eastern imperial exarchy of Ravenna; and it was thereafter known as the law school of Ravenna.⁸ This law school of the Eastern Roman Empire kept alive in Italy into the eleventh century the knowledge of

² See Savigny, *Geschichte d. rom. Rechts*, etc., vol. 2, §64, note (b); Ortolan, *Hist. de lég. rom.* The ante-Justinian Roman law had survived under the Ostrogothic monarchy in the Edict of Theodoric (511-515),—Sohm, *Rom. law*, §22; Ortolan, *Hist.*, §§529, 531; Amos, *Civil law*, p. 416-417.

³ The ancient imperial university of Rome had survived the Ostrogothic occupation of Italy. For the teaching of the older ante-Justinian law was substituted instruction in the Justinianean law books.—See Amos, *Civil law*, p. 102-103; Ortolan, *Hist. de la légis. rom.*, §574; Savigny, *Geschichte d. rom. Rechts*, vol. 1, §134.

⁴ See Savigny, *Geschichte*, ch. 12; Ortolan, *Hist.*, §§597-603, 612; Amos, *Civil law*, p. 419.

⁵ Not only does it preserve Roman law, but it also preserves Roman time: no clock ever strikes more than six—the day is divided into four quarters of six hours each.

⁶ In 568 A. D.

⁷ Although Rome was lost forever to Byzantine rule in 726, and the ex-archy of Ravenna in 752, the south coast Italian cities remained under the Eastern Roman Empire until the middle of the eleventh century. Certainly Venice nominally belonged to the Eastern Empire as late as 1081. See Foord, *Byzantine Empire*, pp. 291, 299, 332, 333, 309.

⁸ The thirteenth century Italian jurist Odofredus speaks of this law-school of Ravenna as identical with that re-established at Rome by Justinian-Savigny, *Geschichte d. rom. Rechts*, vol. 1 §138; Ortolan, *Hist. de légis rom.*, §590.

Justinian's legal system,⁹ so much so that the law books of Justinian survived the power that introduced them and obtained a firm hold on Italian Courts and practitioners.¹⁰

In the very first year of the ninth century occurred an event of greatest importance increasingly fraught with stupendous influence upon later medieval times throughout Europe as well as Italy. On Christmas Day 800, Charlemagne was crowned Roman Emperor at Rome, and the Empire of the West was restored. Western Europe regarded Charlemagne as the lawful successor of Augustus and Constantine. Notwithstanding the adverse conditions of medieval times the restored Western Roman Empire shewed an astonishing vitality; it lasted for over 1,000 years, until 1806, when Napoleon put an end to it. The restoration of the Western Roman Empire had one very marked consequence: it brought Roman law into still further prominence in Italy and elsewhere. The Germanic Roman Emperors adopted for their new empire Roman imperial methods, and called into requisition Justinian's *Corpus Juris* as the actual law of their dominions. The Florentine manuscript of the Digest—the oldest manuscript of Justinian's Digest, written either in the lifetime of that emperor or certainly in the following century—came from southern Italy,¹¹ and is proof positive that the Justinian law books were not unknown in Italy from the sixth to the twelfth century.

1. The first phase in the evolution of an Italian jurisprudence appeared in the latter half of the eleventh century when a revival of interest in Roman law began. A new force arose which freed Roman law from the study of it in the Byzantine manner prevalent at Ravenna. Curiously enough it was supplied by a Germanic people in Italy—the Lombards, in whom the legal instinct was highly developed. At the outset the Lombards had the best statute law in all Italy: this they began to study at the royal Court at Pavia in the new manner—by means of explanatory notes (*glossæ*). The new method succeeded well. Later it was applied by the Glossators of Bologna to the study of the texts of Roman law, being developed with

⁹ St Damian (988-1072) reports a discussion as to the degrees of relationship which occurred in his time at Ravenna, his native country, which was settled by referring to the Institutes of Justinian.—Ortolan. *Hist. de la Légis. rom.*, §612.

¹⁰ It should also not be overlooked that the maritime cities of Italy always maintained commercial relations with Constantinople from the Justinianean reconquest of Italy down to the fall of the Eastern Empire in 1453.

¹¹ Possibly from Amalfi, near Naples.

great skill, and it contributed during the next 200 years most abundantly to a thorough understanding of the *Corpus Juris*.¹²

Not only did the Glossators elucidate the letter of the law: they also reconciled contradictions and connected mutually related parts; all of which was done by searching for "parallel passages"—passages connected with the text under discussion. The results of this labour were collected and summarized in what was called "summaries" (*summæ*), also in imitation of the Lombard jurists. The provisions of pure Roman law of the Justinian period were re-discovered and brought home to the minds of men.

The consequence of the labours of the Glossators was a revival of Roman law study beginning in the middle of the twelfth century and reaching high tide in the thirteenth century—sometimes called from the place of its origin, the Bologna revival, the influence of which was not confined to Italy, but ultimately spread over all of Western Europe and moulded the jurisprudence of the rising European nations.

The Glossators aimed to re-establish the authority of Roman law as a living law. The first step was taken by inserting in the Code of Justinian excerpts from the laws of the medieval or Germanic Roman Emperors of the West. But here was the practical difficulty—the law as applied in Italy was not altogether the pure ancient Roman law; the problem was how to adapt Roman law to the altered conditions of medieval life so as to have it recognized in the law Courts. The solution of this problem was slowly worked out by the successors of the Glossators: the Commentators finally accomplished a permanent amalgamation of Roman law and the law of the Teutonic invaders into an Italian law.

One of the most important results of the Bologna revival of Roman law was the founding of universities throughout Italy.¹³ "The university, as organized by these wise generations of the thirteenth century, has come down unchanged to us in the modern time,"¹⁴ The oldest Italian university is Bologna, the mother of all modern universities.¹⁵ At the start Bologna had but one faculty—that of law.¹⁶ Considerably

¹² On the work of the Glossators, see Sohm, *Roman law*, §§24-26; Ortolan, *Hist. de la légis. rom.*, §§613-617, 618; Savigny, *Geschichte d. rom. Rechts*, vol. 3, ch. 22-25, vol. 4, ch. 41.

¹³ See Savigny, *Geschichte d. rom. Rechts*, vol. 3, ch. 21.

¹⁴ Walsh, *The Thirteenth—Greatest of centuries*, p. 7 and note 1.

¹⁵ It received a charter from the Emperor Frederick Barbarossa in 1158. There is an ancient tradition that it had a fifth charter granted in 433 by the Roman Emperor Theodosius II.

¹⁶ Colquhoun, *Roman Law*, §136 describes in detail the Bologna law school's organization.—terms, examinations, methods of instruction, etc.

later, however, other faculties—medicine, the liberal arts, and theology—were added.¹⁷

The faculty of law for the training of lawyers never lost its original importance: one of the principal features of every Italian university was a faculty of law. Many of these law schools became known beyond the borders of Italy, and attracted students from all over the medieval world. Furthermore, the development of institutions of learning of which the faculty of law formed a necessary part, was not limited to Italy: this beneficent movement early in its history passed across the Alps and the Mediterranean to bless other countries of Europe.

The founder of the Bologna school of the medieval Roman glossators was the twelfth century Irnerius. Other renowned glossators were Vacarius, Placentinus, Azo, and Accursius. Irnerius and his disciples renewed completely the study of Roman law, and by them it reigned a second time over the whole world.

Through the labours of the Lombard Vacarius,¹⁸ began the medieval reception of Roman law in England. Coming to England to act as counsel¹⁹ for Theobald, Archbishop of Canterbury, Vacarius brought with him his manuscript of the texts of Justinian, and founded,²⁰ about 1149, the first English school of law at Oxford with a system of instruction modeled on that of Bologna.²¹

To the Italian Placentinus²² is due the founding of the first French law school at Montpellier, in southern France. Thus was introduced into France the study of law and the system of the Glossators.

Perhaps the most distinguished of all the law professors of Bologna was Azo²³. The thirteenth century English Chief Justiciar of Henry III., Bracton—the father of the English common law—in his own immortal treatise²⁴ used freely, and often copied word for word, Azo's *summa*.²⁵ Once more was English law indebted to Roman jurisprudence.

¹⁷ Savigny records how the schools of medicine and arts were still under the control of the rector of the law school as late as 1295. The theological school was established by Pope Innocent IV. in the second half of the fourteenth century.—*Geschichte d. rom. Rechts*, vol. 3, §67.

¹⁸ 1120-1200?

¹⁹ "Causidius."

²⁰ Bryce, *Studies*, p. 861.

²¹ Ortolan, *Hist. de la legis. rom.* §615.

²² 1120-1192.

²³ 1150-1230.

²⁴ *De legibus et consuetudinibus Anglie*, published about 1256,—Güterbock, Bracton, etc. p. 27-28.

²⁵ Amos, *Civil law*, p. 446; Güterbock, Bracton, p. 51-54.

Among Azo's pupils was Accursius,²⁶ later his colleague at Bologna. Accursius' gloss—usually called the "Great Gloss"—marks the summit of the labours of the Glossators. The fact that his eldest son²⁷ gave lectures on law at Oxford University in 1275-1276, during the reign of Edward I., sheds an interesting sidelight on the continuing influence of the medieval reception of Roman law in England.

Roman law was also revived in the medieval commercial compilations of maritime law which originated in Italy. Three celebrated codes of commercial law were formulated in Europe between the latter half of the eleventh and fourteenth centuries: the Consolato del Mare, the Laws of Oleron and the Laws of Wisby. The oldest of these three—the Consolato del Mare—is a regulation of the sea confessedly based on Roman civil law. The eleventh century Consolato del Mare was subsequently adopted by many cities on the Mediterranean littoral, and from the fourteenth century exercised enormous influence over all southern Europe. It became the law of Venice and Genoa, the rival maritime powers of medieval Italy. The rules of the Consolato del Mare on maritime subjects are very liberal and equitable. These are concerned with the ownership of vessels, the rights and duties of masters and captains, of seamen and freight, salvage, general average and contribution, the rights of neutrals in time of war—in short, with all admiralty matters. Its principles have been universally adopted by nations. It is one of the earliest sources of modern international law as to international trade relations.²⁸

The Church also attempted to harmonize Roman law with the requirements of the age through its Canon law. From the twelfth century onward the Roman Church had become almost the supreme mistress of the western world. Originally confined to ecclesiastical matters, the Canon law sought to reform the secular law as a whole—private, criminal, adjudicative—on lines approved by the Church. The jurisprudence of this papal law was substantially Roman law, modified, however, in accordance with medieval ideas. But here was the limitation of the Canon law: it was not recognized in secular Courts—its recognition being confined solely to ecclesiastical tribu-

²⁶ Francisco Accorso, 1182-1260.

²⁷ Also named Francisco Accorso (1225-1293). See Colquhoun, *Roman law*, §150; Savigny, *Geschichte d. rom. Rechts*, vol. 4, ch. 42; 1 *Encycl. Brittan.*, 11th ed., p. 134.

²⁸ The text of the Consolate del Mare is given by Pardessus in his *Lois Maritimes*, vol. 2, p. 1-360.

nals. The Church was not finally strong enough to effect full recognition of its law in secular Courts.

II: The second phase in the evolution of Italian jurisprudence began in the middle of the thirteenth century when the school of the Glossators was succeeded by the school of the Commentators, which endured for the next two hundred years. These are often called the "Post-Glossators," or "Bartolists."²⁹

The Commentators derived their name from their method of writing lengthy commentaries replete with scholastic distinctions. The method of the Commentators was different from that of the Glossators. The Glossators had written short explanatory notes on the text of the *Corpus Juris*; the Commentators wrote exhaustive discussions of legal doctrines not having much inner connection with the passage of the *Corpus Juris* to which they are connected. The Commentators worked differently because their task was unlike that of their predecessors. The Commentators did not address themselves to explaining the *Corpus Juris*—that task seemed finished to them; but they began the new task of trying to construct a Roman law to fit the actual life of their age.

In the fourteenth century the time had come for amalgamating the Lombardic and Roman population into an Italian people. While Dante, Petrarch, and Boccaccio created a national literature, Cinus, Bartolus, and Baldus created a national law out of Roman law and Lombardic customs. The law of practical life had consisted of three parts—Roman law, statute law of Italian cities, and Canon law. Roman law, theoretically of universal authority, was combined with the German law actually in force, and with the ecclesiastical law of the Church: the result was that the Commentators Italianized Roman law, making it in its combined and composite shape a living common law of Italy. By their development of a scientific system of law applicable in actual life the Commentators first shewed the late medieval and the rising modern world *how to make a national jurisprudence out of Roman law and existing Teutonic customary law by fusing the two*—the Roman law becoming the predominant element.

This new "*Common law*," as events proved, was not to be confined to Italy, but was strong enough to exercise a dominant impulse throughout the western world. So successful were the labours of the Commentators that their new amalgamated

²⁹ See Girard, *Manuel de droit romain*, 5th ed., p. 85.

juridical produce was borrowed all over Europe. Posterity owes an incalculable debt of gratitude to the Italian Commentators for their wonderful success in accomplishing the task to which they addressed themselves.

The development of a *national jurisprudence* was brought about by the Commentators in this way: they introduced scholastic tenets into legal science. Scholasticism consisted in the predominance of abstract conceptions—its essence lay in the predominance of the deductive method. The scholastic position is that science is nothing but what can be deduced from most general conceptions. It is the method of Aristotle applied to law. The Commentators endeavoured by analysis of each rule to trace back the rules of law to general conceptions. Now the Roman jurists never did this: they dealt with definite legal conceptions. But *the principal concern of the medieval Commentators was with the making of definitions and distinctions*. Not yet has the influence of scholastic methods entirely passed away: it is still to be seen in modern jurisprudence.

The Commentators, in transforming Roman law into medieval law, made a sort of philosophical jurisprudence out of law. Reviving the spirit of antiquity, they revived and preached the Greek and Roman doctrine of the *Law of Nature* as permeating all law whatsoever. The Law of Nature was that there is an eternal immutable Natural Law, valid at all times and at all places, which can be deduced by a purely intellectual process from the very nature of things. It took the medieval world by storm, and has continued down into modern times, surviving the advent of the nineteenth century historical school of Savigny. Where scholasticism erred was to suppose that logical inferences can take the place of observations.

The most famous of many renowned Commentators were Cino, Bartolus and Baldus, all of whom lived in the fourteenth century. Cino³⁰ was an eminent jurist and law professor. He was associated with the greatest men of his century: Dante was his friend,³¹ and Petrarch³² and Boccaccio are said to have been his pupils. To another pupil, Bartolus, Cino gave the impulse for his wonderful labours in the field of law.

Bartolus³³ is the greatest of the Commentators. His creative legal genius was of a very high order. Here are two in-

³⁰ Cino da Pistoia (1270-1336).

³¹ See Colquhoun, *Roman law*, §168.

³² Id. Petrarch wrote a famous sonnet on Cino's death.

³³ 1314-1357.

stances: (1) Bartolus discussed the subject of the conflict of laws, and "was the first to point out" that, in determining how far a state should enforce a foreign law, regard must be particularly paid to the question whether the rule of law is real (*circa rem*), personal (*circa personam*), or mixed (*sallemmilitas actus*). This distinction of Bartolus is retained to-day in modern private international law. (2) Bartolus discussed the power of a corporation to make binding rules, and "was the first to point out" that there is a distinction between a rule to regulate a political community and a rule to internally regulate a corporation; that while a corporation can make rules of the latter sort, rules of the former sort can be made only by somebody having political authority. Thus Bartolus expressed for the first time the distinctive character of the State's political authority.³⁴ The great reputation of Bartolus rests on his revival of the exegetical system of teaching law. His best work is his "Commentaries" on Roman law, which became renowned for their excellence all over Europe.³⁵ These actually received at one time statutory authority in Spain and Portugal.³⁷ In France the opinions of Bartolus were so influential in Courts of justice that their weight gave rise to the proverbial expressions, "*plus résolu que Bartole*" and "*résolu comme un Bartole*." The influence of Bartolus was international. He was the central figure of the Middle Ages in legal history. Not only did he create a common law for Italy, but he is to be regarded as "the creator of the common law of Germany which sprang from the reception" of Roman law into the German states.³⁸

Next in rank to Bartolus is his pupil Baldus.³⁹ The reputation of Baldus was great in Italy, but he was not so distinguished internationally as Bartolus. When Roman law as embodied in the commentaries of Bartolus was received into Germany, those of Baldus were also received in a secondary degree.⁴⁰

CHARLES P. SHERMAN.

Faculty of Law, Yale University.

³⁴ See Sohm, *Roman Law*, §27.

³⁵ For their description, see Colquhoun, *Roman law*, §135; Ortolan, *Hist. de lég. rom.*, §629.

³⁶ Other valuable works were his treatises *On Procedure* and *On Evidence*.

³⁷ Sohm, *Roman law*, §28.

³⁸ Sohm, *Roman law*, §28.

³⁹ Baldeschi (1327-1406).

⁴⁰ See Sohm, *Roman law*, §28.

SASKATCHEWAN STATUTES.

Whatever unfavourable comment any adverse critic may feel disposed to make upon the legislation of the Province of Saskatchewan, it is quite certain that, if he have the slightest regard for the Eternal Verities, he cannot accuse it of a slavish imitation of the enactments of the older provinces.

Indeed, so far is this from the case that it is positively refreshing to witness the breezy boldness and nonchalance with which this vigorous young community has blazed and followed out its own path through the jungle of legal difficulties that confronted it. In some respects this free and easy dealing with the time-honoured traditions of the past reminds one of the antics of a lot of school boys broken loose from the life-long trammels of the old-time teachers, and resolved not only to have a thoroughly good time, but also to shew their utter contempt for everything which they had been compelled to regard with reverence in the days of their innocent youth.

LEGISLATIVE NECROMANCY.

For instance, no feeling of reverence has prevented them from laying violent hands on even so time-honoured an institution as the English language, and decreeing that certain words, which have heretofore from time immemorial borne a certain meaning, shall henceforward bear an entirely different meaning. It is almost like a conjuring trick and is quite a novel experience in etymology.

To come to concrete instances. No word is probably better established in the nomenclature of English and Canadian—and we may add, American—law than the familiar word “incumbrancer.” Everyone knows what an incumbrancer is. He is one who holds or owns an incumbrance (such, for instance, as a mortgage) on land.

How familiar in mortgage actions has ever been the practice which prescribes an enquiry as to subsequent incumbrancers, meaning persons who have charges on the land subsequent to the mortgage in question. That is all very familiar learning, of course.

But in Saskatchewan we find that “by the stroke of a quill” the meaning of the word “incumbrancer” has been turned completely round. In that Province it means not the

one who *holds* an incumbrance but the one who *creates* it. To indicate the one who holds the incumbrance a new word has been created. That individual is an "incumbrancee." Now, some purists may cavil at the temerity of a youthful community of the English race that does not hesitate to lay sacrilegious hands upon the time-honoured English language, but at least such critics must admit that there is a strong dash of logic in the action of this young Province. For, if one who mortgages, or makes a mortgage, is a mortgagor, and one to whom a mortgage is made, a mortgagee, why should not one who incumbrances, or makes an incumbrance, be an incumbrancer, and one to whom or in whose favour it is made an incumbrancee. Surely that is logical. "Very good," you say, "then let us pursue the argument a little further." If this line of argument is sound and is a sufficient excuse for wrenching well established English words from their recognized meanings and arbitrarily affixing new meanings to them, then it is equally permissible to carry the line of reasoning to its logical conclusion, and to apply it to all words of similar formation. So, for instance, we get rid at one stroke of the great army of pensioners. What a boon to our cousins across the border, could they follow our lead—because it is obvious, by the same chain of reasoning, that a pensioner must be one who pensions, or bestows a pension, and the one who receives it becomes a pensionee. And similarly we rid ourselves at once of the great and objectionable host of "prisoners," because a prisoner is evidently one who prisons or puts in prison some one else, and the person imprisoned is obviously a "prisonnee." So we have the curious result of the learned Judge (for it is he who imprisons the malefactor) finding himself suddenly converted into the "prisoner," while the erstwhile prisoner becomes the prisonnee. But to pursue this line of argument is too bewildering. It reminds one of Gilbertian comic opera, where one is not surprised to be told that

"General John as private James
Fell in, parade upon,
And private James by change of names
Was Major General John."

It would in point of fact require the genius of the late lamented Mr. Gilbert to do complete justice to the situation. Some may be inclined to ask, "What was the necessity or what the utility of separating incumbrances into "mortgages"

and "incumbrances" and providing different statutory conditions for each.

The object and effect of the instrument is in each case precisely the same, namely, to charge the payment of certain money on certain land. The distinction seems to be that if the money is a debt or loan the instrument is to be called a mortgage, and to assume a slightly (but not materially) different form, whereas, if it is a newly created obligation as an annuity or charge it is to be called an incumbrance.

Some may be inclined to question the utility of this distinction.

As the condition for redemption in a mortgage may be infinitely variable, the ordinary lawyer will be inclined to ask why could not the ordinary mortgage be left to do the work which has by the Act been assigned in part to mortgages and in part to incumbrances, or what is gained by inventing this new creation and calling it an incumbrance as distinguished from a mortgage?

In addition to this novel expression one will find others of a similar nature scattered through the statutes. What, for instance, are we to say of such an expression as "female testatrix"¹ occurring in the statute book of a dignified province? One will find it difficult to understand what can be said in its support.

INTREPID PIONEERS.

However, whatever views one may have as to the temerity of the Saskatchewan legislators in taking liberties with the King's English, one may well admire the intelligent and fearless manner in which they have attacked the problems which they believed to be peculiar to the conditions prevailing in their own country. Take the question of seed grain for example. Probably no country in the world is more dependent than our North-West Territories on the annual cereal crop. It is the very life of the country. The legislators have wisely recognized this, and have enacted legislation specially directed to protect and improve the conditions in respect of this important subject. For instance, they have a statute which provides that no mortgage of growing crops or crops to be grown in the future shall be valid, except in so far as the same shall have been made as security for the purchase-price of seed grain.

¹ R. S. S. Cap. 44. Sec. 36.

Mortgages of seed grain are to be taken as within the provisions of the Bills of Sale Act, and the affidavit of *bona fides* is to shew that the same were taken to secure the purchase-price of seed grain. Such seed grain mortgages are to be a first and preferential security.

Then in respect of another great industry of the province, to wit, the lumbering business, we find special legislation of a very salutary character safeguarding the rights and interests of the labourers.

The same with regard to the threshers and their employees, and numerous other subjects appertaining in a peculiar manner to the conditions and needs of these great northern provinces.

The legislation of the province bears evidence that the important question of the peculiar conditions and special requirements of the country have formed the subject of very careful consideration to the legislators, and it will, we think, be the general opinion that the result of their labours has been greatly beneficial to the Province.

THE FAVOURED WIDOW.

One feature of their legislation is worthy of remark. There has never been any dower in Saskatchewan. One might not unnaturally conclude from this that the wife is not a specially favoured individual in that Province. Anyone who jumped to that conclusion, however, would find himself woefully mistaken, for by a recent Act (1911), they have showered upon the wife a wealth of blessings not dreamed of in the philosophy of any other community.

It is another instance of the characteristic fearlessness of these legislative pioneers. They have dashed through the law of wills and the law of private property like so many pie crusts, and have provided by an Act of their Legislature (1910-1911, Chapter 13), that it shall be impossible for a testator to treat his widow unfairly in the disposition of his property. The Act gives the widow the right, at her option, to reject the provisions (if any in her favour), of the will and elect to take, in lieu thereof, a proportion of the estate equivalent to the share she would have been entitled to, had the testator died intestate leaving children. The details are, under the Act, to be worked out through the medium of the Court upon an application by the widow.

MISCELLANEOUS COMMENT.

To an outsider reading the legislation of the Province for the first time there are various points which seem to call for comment. We shall endeavour to touch shortly upon a number of them which are to be found in the Revised Statutes, 1909, and subsequent Acts:—

1. Rev. Stat. Sask. cap. 38, sec. 14 (The Succession Duties Act). This section provides that the duty shall be payable within 18 months of the decease. Then comes the following proviso: "Provided that no duty is payable on the estate, or that the duty chargeable upon any legacy given by way of annuity, whether for life or otherwise, shall be paid by four equal payments, the first of which payments of duty shall be made before or on completing payment of the first year's annuity, and the three others of such payments of duty shall be made in like manner successively before or on completing the respective payments of the three succeeding years' annuity respectively."

It seems difficult to understand what this section means. Is it not expressed in a somewhat involved and obscure manner?

2. R. S. Sask. cap. 41, sec. 6 (Land Titles Act):

"No estate in fee simple shall be changed into any limited fee or fee tail, but the land, whatever form of words is used in any transfer, transmission, or dealing shall, except as hereinafter otherwise provided, be and remain an absolute estate in the owner for the time being."

It is presumed that the intended effect of this section is to abolish estates tail in Saskatchewan.

If that is the case some alteration should be made in sec. 5, sub-sec. 8 of the Succession Duties Act. Sup. Where we find the expression "including the power exercisable by a tenant in tail," etc.

3. R. S. S. cap. 41, sec. 64:

"After a certificate of title has been granted for any land no instrument until registered under this Act shall be effectual to pass any estate or interest in any land except a leasehold interest not exceeding three years or render such land liable as security for the payment of money except as against the person making the same."

The expression "any land" in the third line should evidently be changed to "such land."

CUMBROUS PROCEDURE UNDER MORTGAGES.

4. R. S. S. cap. 41, sec. 93. To Ontario lawyers accustomed to the simple and expeditious (and it may be added, inexpensive) system of procedure under power of sale, the procedure under mortgages in Saskatchewan seems to be unnecessarily cumbrous and burdensome. Apparently procedure under power of sale is little resorted to. Why, it seems difficult to understand. Procedure by way of foreclosure or sale under judicial or quasi-judicial authority seems to fall under two different headings, the one being the ordinary procedure through the Courts and the other under the Land Titles Act. This latter procedure seems to be open to serious objection.

The provisions appear to be as follows:—

(Sec. 93) (a) Default must occur for one calendar month or for such longer period as may be expressly limited by the mortgage.

(b) The mortgagee may then “pursuant to any covenant in that behalf, contained in the mortgage” (what would happen if the mortgage contained no such covenant is not provided for) “after giving written notice (which is to be filed also in the Land Titles Office) enter into possession and receive the rents and profits of the land and may lease the land.”

(c) The same notice may require payment within a specified time and observance of the mortgage covenants, and may contain a notice that in default “all remedies competent” (sic) will be resorted to.

(d) If default then continues for two calendar months after service of such notice the mortgagee is authorized “pursuant to any power of sale contained in the mortgage” to sell the land in such manner as the Registrar may direct.

It will be observed from the above, that, when default occurs, the mortgagee is given power simply to lease the land. Let us suppose he acts on this and creates a lease, let us say for two years. Then after two months' further delay he is empowered to sell—but having already leased he has practically put it out of his power to sell, at least to advantage, as no one wants to purchase a farm subject to a two years' lease.

Then why should the Registrar be brought into the matter?

One would suppose that if the parties had contracted for a reasonable power of sale on default there would be no reason why that power should not be exercised without recourse to the Registrar, subject of course to the well understood conditions as to reasonable exercise of the power which the Courts require to be observed.

5. R. S. S. cap. 41, secs. 99 and 100:

These sections deal with transfers of mortgages. Sec. 99 (2) provides that the Registrar shall enter on the certificate of title, amongst other things, the name of the transferee. Sec. 100 thereupon proceeds to provide that such transferee shall thereupon become subject to and liable for all and every the same requirements and liabilities to which he would have been subject and liable "if named in such instrument."

What is the meaning of that? Surely the transferee is and must be "named in such instrument" if "such instrument" means the transfer as by ordinary grammatical construction it must.

Possibly "such instrument" is meant to refer to the mortgage, incumbrance, or lease. The frame of the sentence seems to be unhappily conceived.

As to the extent to which trusts are recognized in connection with land, subject to the Land Titles Act, reference may be had to secs. 68, 101, and 114. The policy of the Act seems to be that while no entry giving notice of any trust is to be made on any certificate of title, that is not to prevent the existence of trusts in connection with such land or their enforcement by the Courts.

ASTONISHING EFFECT OF A POWER OF ATTORNEY.

6. R. S. S. cap. 41, sec. 104:

This section contains a somewhat startling provision. It is neither more nor less than this, that if the owner of land gives a power of attorney to another to transfer or otherwise deal with such land, the owner's right to transfer or otherwise deal with that land is thereby suspended till the power of attorney is revoked. So we have this extraordinary result. A. owning land gives a power of attorney to B. to lease it for a year. A. immediately thereby loses the right to sell or transfer that land. In fact, while that simple power of attorney remains in existence no one can sell or transfer the land. Not

B., because he only holds a power of attorney to lease for a year. Not A., because on giving this harmless power of attorney, the statute has deprived him of all power of selling or otherwise dealing with his own property. Surely this result was not intended by the Legislature.

7. R. S. S. cap. 41, sec. 118 (5):

"Every writ received by the Registrar of any district at the expiration of two years from the date of the receipt thereof shall cease to bind or affect the land of the execution debtor in such district unless," etc.

This is surely very badly expressed. How can a writ be received by the Registrar at the expiration of two years from the date of its receipt by him. Probably what the Legislature meant to say was, "Every writ received by the Registrar of any district shall at the expiration of two years cease," etc.

Even that is bad enough, as the writ never is received by the Registrar, but only a copy thereof. See sec. 118 (1) and (3).

This may seem to some to be a trifling error, and it may be said that the Court would understand what was intended and construe the Act accordingly, but in point of fact it is extremely doubtful whether the Courts would feel disposed to do, or would in fact be warranted in doing anything of the kind.

Suppose a concrete case: A. is sued for damages for having seized upon a writ which is alleged to have expired under this section. A. pleads that the writ has not expired inasmuch as the writ had never been received by the Registrar but only a copy thereof. Could the Court mulct A. in damages? Would it not rather be disposed to say on the well-understood principles of interpretation of statutes, "It is not our province to correct the errors of the Legislature. We can only interpret their language used and here we find no ambiguity?"

THE ACTION OF EJECTMENT.

R. S. S. cap. 41, sec. 136: This section provides that no action of ejectment shall be sustained against the holder of a certificate of title to a certain parcel of land except in six

*The Court might be inclined to say, as was done by Lord Abinger, C.B., in *Hall v. Franklin* (1838), 3 M. & W. 250, p. 275: "We have been strongly pressed with the inconveniences that may result from this construction of the Statute. We are not insensible to them, but the only proper effect of that argument is to make the Court cautious in forming its judgment. We cannot, on that account, put a forced construction on the Act of Parliament."

specified cases, but that in case of any such action the production of the duplicate certificate of title shall be an absolute bar to the action. Does this clause really mean what it says? For instance, A. owns a piece of land and holds the certificate of title for it. He abandons it and B. enters and remains in possession a sufficient length of time to give him title by possession. Then while B. is absent for a day A. re-enters. Under this section B., though the undoubted owner, is powerless to eject A. The production of A.'s certificate bars the action.

Is not the circumscription of the action of ejectment by this section somewhat too sweeping?²³

R. S. S. cap. 41, sec. 137: Here is a curious provision: "After a certificate of title has been granted for any land, any person deprived of such land in consequence of fraud, or by the registration of any other person as owner of such land or in consequence of any fraud, error, omission, or misdescription in any certificate of title, or in any memorandum thereon or the duplicate thereof or otherwise, may:

(a) If the land has been included in two or more grants from the Crown; and

(b) In any other case;

bring and prosecute an action at law for the recovery of damages against the person upon whose application the erroneous registration was made, or who acquired title to the land in question through such fraud, error, omission, or misdescription.

What possible object can there be in enumerating certain special cases in which the action may be brought if you are going to end with "and in any other case"?

²³ In the Ontario Land Titles Act a provision is contained that no title to any land adverse to, or in derogation of, the title of the registered owner, shall be acquired by any length of possession, but we find no similar provision in the Saskatchewan Act. In point of fact we understand that the English Property Limitations Act 1874, was introduced into Saskatchewan by one of the Provincial Statutes, and is now in force there.

Since writing the above we have propounded the above question to a member of the Saskatchewan bar at present practising there. His view of the matter is expressed as follows:

"In my opinion the proper course to be taken by a person claiming property by possession, under the circumstances you mention, is to bring an action to have himself declared the owner under title by possession, and, if the property has been brought under the Land Titles Act, to apply for a vesting order; he then becomes the holder of the Certificate of Title and is entitled to bring an action of ejectment. If the property has not been brought under the Act, a recent Saskatchewan case holds that it is not necessary or proper to issue a vesting order, but that the holder of the title by possession may apply direct to the Registrar and obtain a Certificate of Title."

Clauses (a) and (b) should be struck out of the section entirely as they are mere verbiage and add nothing to it.

STATUTE OF LIMITATIONS.

R. S. S. cap. 41, sec. 143:

"The plaintiff in the action within six years from the date on which such disability ceased, and the plaintiff in any such action at whatever time it is brought, and the plaintiff in any action for the recovery of land shall be nonsuited in any case in which it appears to the satisfaction of the Judge before whom such action is tried that the plaintiff or the person through or under whom he claims title had notice by personal service, or otherwise was aware of such delay and wilfully or collusively omitted to lodge a caveat or allowed the caveat to lapse. 1906, ch. 25, sec. 154.

This section seems so obscure as to be almost unintelligible. What is the meaning of "such delay" in the eighth line? No delay has been mentioned.

Three cases are dealt with by the section. Let us take the last. It is as follows: "The plaintiff in any action for the recovery of land shall be nonsuited in any case in which it appears to the satisfaction of the Judge that the plaintiff or person through whom he claims has notice or was aware of such delay," etc. Surely that is meaningless. What delay?

If the general policy of this and the preceding section of the Act is intended to be the fixing of a six-year limitation within which a certain action may be brought, and the superimposing upon that provision of a further stipulation that if the plaintiff might have brought his action at an earlier period than he did, even though his action is within the prescribed period, he shall still be nonsuited, the provision seems to

In the short time at our disposal before going to press we have not been able to give this reply very careful consideration, nor have we been able to find the Saskatchewan case referred to.

As a matter of first impression, however, we should be inclined to make the following comment upon it namely; that, in the first mentioned case, the dispossessed owner does practically bring an action of ejectment, and that, in the last mentioned case, if the meaning of the reply is that it is open to an occupant of land claiming title by possession (although the property is at the time in the adverse possession of another) to apply ex parte to the Registrar, and obtain a Certificate of Title to that land, such practice would seem to be fraught with serious danger to land-owners, and would seem to indicate an extent of jurisdiction in the Registrar which is little short of astonishing.

It would practically seem to mean that the Registrar is given power to decide an action of ejectment on ex parte evidence.

run directly counter to all approved legislation of other provinces and countries on this subject, and seems in the writer's humble opinion to be of very doubtful utility.

Our Ontario statute gives the dispossessed owner of land ten years to bring his action before barring his right in favour of a squatter. What would be thought of an attempt to add a rider to this statute that the owner should be barred in a shorter time, if he might within that time have brought an action to recover possession but did not?⁴

R. S. S., cap. 41, secs. 144 and 145:

These sections may be cited as instances of the awkward wording of many of the Saskatchewan statutes.

Sec. 144. "Whenever any amount has been paid out of the said assurance fund on account of any person the amount may be recovered from him or if dead from the estate of such person." Why not say "from his estate" instead of "from the estate of such person."

Sec. 145. "Whenever any amount has been paid out of the assurance fund on account of any person who has absconded or who cannot be found within Saskatchewan, and has left any real or personal estate within the same upon the application of the Registrar," etc. The instance of the figure commonly known as *anacoluthon* in the expression "and has left" and the expression "within the same" seem to offend against all recognized canons of graceful diction, and again in sub-sec. (2) of sec. 145, we find the following: "Such judgment shall be final, subject only to the right to have such judgment opened up as may be provided in relation to ordinary procedure in Saskatchewan in cases of judgment by default."

R. S. S. cap. 41, sec. 162, sub-sec. (2):

Here is a curious provision: "The knowledge that any trust or unregistered interest is in existence shall not of itself be imputed as fraud. 1906, ch. 24, sec. 173."

One would suppose that it would hardly be necessary to legislate to that effect. It would be indeed a curious circumstance if the mere knowledge on the part of any person that a trust existed in relation to a certain parcel of land could in itself be imputed to that person as fraud.

⁴This section seems to be open also to the same objection as that noted in respect of section 137 above referred to, viz., that if you are going to end with a general clause making the legislation applicable to all cases, it seems quite futile to go to the trouble of first enumerating a number of special cases.

R. S. S., cap. 42, sec. 11: Here we have another instance of awkward form of expression. The words are, "no resolution passed under the last preceding section shall have any force or be operative until the same has been submitted to the said board of management *and the consent thereto of the said board of management has been engrossed in writing under their corporate seal.*"

What is intended by the words in italics is, no doubt, something to the following effect, "and received the consent of the said board testified by a written memorandum duly executed under the corporate seal of the board." Possibly the word "engrossed" is a misprint for "indorsed."

R. S. S., cap. 43, sec. 10, line 4:

Probably "next to kin" is a misprint for "next of kin." In the same line apparently the word "that" should be inserted after the word "excepting."

R. S. S., cap. 44, sec. 25:

There is a slight error in the marginal note here, the word "legacies" being used where "devises" is intended.

R. S. S., cap. 44, sec. 36: It is in this section that the expression "female testatrix" above referred to occurs.

CURIOUS PROVISION AS TO JURY CASES.

R. S. S., cap. 59, sec. 13:

In Saskatchewan the provision is that the expense of juries for the trial of actions must be borne by the litigants and not by the state. Where a litigant demands a jury he must deposit with the local Registrar such sum as the Registrar considers sufficient for the payment of the jurors' fees and the expenses of summoning them. Where the Judge directs the action to be tried by a jury he may name the party to deposit the said expenses, and the same may be eventually allowed and taxed against the unsuccessful party to the action.

Provision is also made enabling the Judge to apportion the expenses.

These provisions certainly strike one as a most unwarrantable burden on the administration of justice. There would seem to be no more reason for requiring a litigant to pay the expenses of the jury than for demanding of him payment of the stipend of the Judge, or indeed, the expense of the erection of the Court House in which his case is tried.

R. S. S., cap. 59, sec. 39 (2) :

This provision is on the same lines, and is to the effect that the unfortunate unsuccessful litigant may be saddled also with the expense of providing lodgings and refreshment for the jurors during the time they are not allowed to separate.

Verily the burdens placed upon the individual seeking to have recourse in the Courts for the purpose of obtaining redress of his wrongs in Saskatchewan are many and grievous. Would it not be better to abolish the Courts altogether and have done with it?

R. S. S., cap. 72, sec. 11:

This section contains a curious provision. It is to the effect that "the articles" (of association in the case of Companies) "shall be expressed in separate paragraphs numbered arithmetically!"

It seems difficult to understand how paragraphs could be numbered otherwise than arithmetically. This expression in its redundancy reminds one again of the expression "female textatrix" already referred to.

MECHANICS' LIEN ACT.

R. S. S., cap. 150, secs. 3 and 4:

These sections of the Mechanics' Lien Act contain a provision which seems to be entirely unintelligible. Section 3 provides that any agreement by a workman that the relief provided by sec. 4 (the creation of a lien in his favour for work done) shall not have effect, shall be null and void.

Then sec. 4 proceeds, as follows:—

"Unless he signs an express agreement to the contrary, and in that case subject to the provisions of sec. 3, any person who performs any work or service upon" . . . "any erection or building" . . . "shall by virtue thereof have a lien for the price of such work."

The meaning of this seems to be "every workman shall have a lien for his work unless he signs an agreement to the contrary, and even then he shall still have a lien because such agreement is void under sec. 3."

If it does not mean that, what does it mean?³

³ On referring to "The Mechanics' Lien Act" in the Revised Statutes of Ontario (189.) ch 153, sec. 3 & 4 the puzzle is explained. The sections now under comment are taken from the Ontario Act. But in the Ontario Act after the first mentioned provision (*viz.*, that prohibiting workmen from contracting themselves out of the opera-

LIENS IN GENERAL.

R. S. S., cap. 152, sec. 2:

This Act relates to threshers' liens. It is remarkable, by the way, what a mania they seem to have in Saskatchewan for the creation of liens in favour of workers. Thus besides the Mechanics' Lien Act, we have the Woodmen's Lien Act, The Threshers Lien Act, The Threshers Employees' Lien Act, the Lien for Improvement of Chattels Act, etc. In fact the only workman we can think of at the moment, who has not had a special Act passed, securing him a lien, is the street scavenger. We cannot discover that any Act has yet been passed securing him a lien on the street.

Some of the provisions of these Lien Acts are extremely complicated and involved. Take for instance the following from the Threshers' Lien Act, which provides that a thresher may take grain to secure payment for his work.

"The quantity of grain which may be so retained shall be a sufficient quantity, computed at the market value thereof at the nearest market, less one and one-half cents per bushel in the case of oats, and two cents per bushel in the case of all other grain, for each five miles or fractional part thereof between the place of threshing and the nearest market for hauling the same to and delivering the same at the nearest available market when sold to pay for the threshing of all grain threshed by the person taking the grain or by his servants or agents for the owner thereof during that same season."

A sentence of this kind is enough to make one's head-whirl,

Let anyone read the sentence over two or three times, and see if he can extract any meaning from it, and also incidentally whether he can parse it.

If you come successfully through that ordeal try your hand on the following from the Threshers' Employees Act. This Act gives the thresher's employee a claim for his wages against the earnings of his employer in the hands of the third person for whom the threshing was done. Sections 8 and 9 provide that the third person may in case of dispute, pay the money owing by him to the thresher into Court.

tion of the Act) there follows the following clause: "This section shall not apply to any foreman, manager, officer, or other person whose wages are more than \$3 a day." That clause is omitted from the Saskatchewan Act. Of course its omission required the omission also from the next section of the words "unless he signs an express agreement to the contrary." That point was evidently overlooked, however, with the curious result above noted.

Then follows the section in question :—

“The person so paying money into Court under the provisions of secs. 8 or 9 of this Act shall be entitled to deduct therefrom his necessary disbursements and costs (not exceeding five dollars), except when such sum of money is larger than the amount of the claim of the employee, in which case the person so paying money into Court may deduct such costs and disbursements out of the balance in his hands, but if such balance is not sufficient to cover such disbursements and costs, he may deduct the difference from the amount to be paid into Court. 1908-9, cap. 11, sec. 10.

It looks, as Lord Dundreary would say, like one of those things that no feller can find out.

EXEMPTIONS FROM EXECUTION.

R. S. S., cap. 47 :

But the most astounding statutory provisions of Saskatchewan, are found in the Act relating to the exemptions from execution.

It is a policy generally recognized in most countries that it is reasonable, and in the best interests of the public that certain limited exemptions should be accorded to needy debtors, to the end that they may not be absolutely deprived of the means of subsistence, and rendered mere burdens upon the State. But listen to the bounteous manner in which Saskatchewan deals with them.

The following is the list of exemptions in force there :—

“The following real and personal property of an execution debtor and his family is hereby declared free from seizure by virtue of all writs of execution, namely :—

1. The necessary and ordinary clothing of himself and his family ;

2. Furniture, household furnishings, dairy utensils, swine and poultry, to the extent of five hundred dollars ;

3. The necessary food for the family of the execution debtor during six months, which may include grain and flour or vegetables and meat, either prepared for use or on foot ;
“(‘On foot’ seems a curious expression by the way, more especially when applied to vegetables.)”

4. Three oxen, horses or mules or any three of them, six cows, six sheep, three pigs and fifty domestic fowls, besides the animals the execution debtor may have chosen to keep for

food purposes and food for the same, for the months of November, December, January, February, March, and April; or for such of these months or portions thereof as may follow the date of seizure, provided such seizure be made between the first day of August and the thirtieth day of April next ensuing;

5. The harness necessary for three animals, one wagon or two carts, one mower or cradle and scythe, one breaking plough, one cross plough, one set of harrows, one horse rake, one sewing machine, one reaper or binder, one set of sleighs, and one seed drill;

6. The books of a professional man;

7. The tools and necessary implements to the extent of two hundred dollars used by the execution debtor in the practice of his trade or profession;

8. Seed grain sufficient to seed all his land under cultivation, not exceeding eighty acres, at the rate of two bushels per acre, defendant to have choice of seed, and fourteen bushels of potatoes;

9. The homestead, provided the same be not more than one hundred and sixty acres; in case it be more the surplus may be sold subject to any lien or incumbrance thereon;

10. The house and buildings occupied by the execution debtor, and also the lot or lots on which the same are situate according to the registered plan of the same to the extent of fifteen hundred dollars. C. O., 1898, ch. 27, sec. 2."

Commenting on these bounteous provisions in aid of the execution debtor, a friend of ours who had recently returned from a visit to Saskatchewan, expressed himself as follows:—

"Picture to yourself the comfortable dishonest debtor reclining at his ease in his arm chair—part of his \$500 stock of furniture—in his \$1,500 house, surrounded by his three horses, six cows, six sheep, three pigs, and fifty domestic fowls, with his thrifty \$200 stock of tools, and his snug provision of six months food for himself, family and live stock, interviewing his humble and needy creditor, the corner grocery woman, to whom he owes \$35 for food supplied, and calmly bidding her 'to go — Jericho,' when she pleads for payment of her modest bill, and explaining to her that he hasn't more than two or three thousand dollars for himself, all told, and that, therefore, she must not be so presumptuous as to expect payment of her account, and further picture to yourself the law patting him on the back and aiding and abetting him in this gentle divertisement.

Talk about the robber barons of the Rhine, entrenched in their mountain fastnesses, levying tribute in ancient days on the defenceless peasantry. They were mere shoestring pikers compared to these bloated plutocrats.

The Rhine country may have had its attractions in by-gone days; but for a real whole-hearted, dishonest, debtor, who has resolved to hoist the Jolly Roger, and live at home at ease, toiling not, neither spinning, but preying quietly on his fellow creatures, Saskatchewan is the place to live."

But this is surely too drastic a criticism.

F. P. BETTS.

London, Ont.

EDITORIAL.

AMERICAN BAR ASSOCIATION.

In the opening address of President Kellogg of the American Bar Association at Montreal, the theme was on notable changes in the statute law. "The statute which has attracted the most attention, stimulated the widest discussion, and raised questions of the most far-reaching and momentous consequences to the nation and its relations with foreign powers is the *Alien Land Law of California*. This statute, which became a law on May 19th, 1913, permits aliens eligible to citizenship to possess, enjoy, transmit, and inherit real property in the same manner as citizens.

"The question raised is whether a state may in violation of a treaty between the United States and a foreign power regulate the ownership of real estate within its borders by citizens of a foreign country. If citizens of Japan have any right to own real estate in California, it is difficult to see how this law takes away such right because it provides in substance that such aliens may acquire, possess, enjoy and transfer real estate in the manner and to the extent and for the purposes prescribed by any treaty.

"But the question has been squarely raised by the declaration of the Legislature of California which was intended and understood by the public generally to mean that California claimed such right notwithstanding any treaty provisions with the Federal Government.

"The passage of this law by the Legislature of California and the public discussion which followed have raised a question which may disturb the amicable relations heretofore existing between the United States and Japan—a question of vital importance to our nation in its relation with foreign Governments.

CAN DEFINE BY TREATY.

"I am convinced that there can be no serious doubt that the Federal Government may, by treaty, define the status of a foreign citizen within the States, the places where he may travel, the business in which he may engage, the property he may own, both real and personal, and the devolution of such

property upon his death; that such a treaty constitutes the supreme law of the land; and that a State law contravening such a treaty is void and will be so declared by the Court in a suitable action."

The above gives a gist of President Kellogg's very able address, and he supported his contention of the supremacy of the Federal Government by citing a number of well-known decisions. It is interesting to state, however, that one of the • visiting delegates from California, during the course of the President's address, made the statement that there had been, as yet, no case in which these conditions covered by the Alien Land Laws had come up before the Supreme authorities for adjudication, and that when such an action arose the law was in danger of being upset. The vital importance of this subject both to the Federal and state authorities, cannot be over-estimated, especially when the varying attitude of the Japanese at home and in Washington is considered. No nation is quicker to estimate conditions than are the Japanese, and matters must be considered serious and fear felt that the Federal Government might hesitate to enforce what must be considered the law against California before an appeal was made to Washington.

Charles Gibson, the young man who was sentenced to be hanged for the murder of Joseph Rosenthal, has been reprieved. Every one will rejoice at the clemency shewn by the Department of Justice at Ottawa, as undoubtedly there must have been good cause why, at the eleventh hour, the decision which had been previously considered unalterable should be changed.

At the trial of this young man every care had been taken by his counsel, Mr. Aubrey A. Bond, in securing every tittle of evidence which would tell in favour of his client. The jury were twelve good men and true, who undoubtedly weighed the evidence adduced most carefully and after so doing had come to the conclusion that the young man was guilty of the crime for which he was being tried.

The learned Judge, the Honourable Sir William Mulock, gave every consideration to the argument subsequently brought forward as to the relevancy of certain evidence in an application for a new trial, and when everything possible had been done Gibson had been found guilty.

A stay of the execution for three months had been granted, which was apparently considered as preliminary to a reprieve, but until the last moment this had been refused, and whether it was due to the efficacy of the plea of Mr. T. Herbert Lennox; or to the weight of the fifty thousand names on the petition, or the possibility of new evidence being forthcoming, at the last moment Gibson was given a new lease of life with a possibility of a new trial in the near future.

The question arises,—is justice sacrificed to sentiment? Every one appreciates all that can be said in favour of the qualities of mercy, but with a fair trial by one of the ablest Judges on the Bench and the brilliant defence of counsel, for the carrying out of sentence to be delayed and the hopes of the accused to be buoyed up by the expectation of a reprieve appears to be altogether wrong.

Either trial by jury, the principle of which was struggled for for so many hundreds of years, is useless and of no avail and should be abolished, or the sentence imposed by the Court should be carried out and not all the sentiment of the public should have any weight to prevent this being done.

POINTS OF SPECIAL INTEREST IN CANADA'S FEDERAL CONSTITUTION.*

By A. H. F. LEFROY.

In venturing to read a paper upon points of special interest in the Federal Constitution of this Dominion, I feel the disadvantage of having to discuss the subject from a purely academic standpoint. I must crave the indulgence of any present who may be engaged in the actual working of the Constitution, or in active political life, and who have thereby acquired a practical knowledge to which I cannot aspire.

Of the general interest of the Constitution of this Dominion it is impossible to speak in terms of exaggeration. Properly conceived, the founders of Confederation and framers of the British North America Act were, perhaps, undertaking as important a task as any set of men ever put their hands to. For consider what establishing a federal constitution for this country meant. It meant establishing the scheme and fixing the lines along which a people destined in the natural course of things to number tens of millions should conduct the fundamental business of their national life, in a country whose limits transcended those of the United States itself.

It is quite true that the Constitution under which we live in Canada remains largely unwritten, but so far as the skeleton scheme of the Confederation is concerned, and the broad diversions which separate the legislative powers of the provinces from that of the Dominion, it is a written Constitution, and written in lines which are meant to be lasting. It was not for the framers of the British North America Act to regard themselves as establishing a federal Constitution for any limited period. When the founders of the United States Constitution took in hand the question what powers they should allow of amendment, they made the requirements so difficult of fulfilment, that it may be said without exaggeration to-day that nothing less than the force of revolution can secure the amendment of the Constitution of the United States in any essential or important particulars. True, in theory the power remains

*This paper was read before the Canadian Political Science Association at its opening meeting at Ottawa on September 5th, 1913.

in the Imperial Parliament to amend the British North America Act at any time. But this is a power which would only, and could only, be exercised to carry out the wishes of this country as a whole. It was for the Fathers of Confederation to build, so far as in them lay, not for time, but rather for eternity.

I think, then, that the best way to discern the points of special interest in our Constitution is, in the first place, to conceive clearly in a broad way what was the real problem which the framers of the British North America Act had before them. It was no mere matter of combining parliamentary responsible government with a completely organized federal system, while maintaining intact the Imperial connection? Even so this was a thing never accomplished, nor attempted before. But their task was far more than this. It is true they set out, as they themselves state in the preamble of the Act, to federally unite the provinces into one Dominion 'with a constitution similar in principle to that of the United Kingdom,' and in pursuance of that object they had, amongst other things, to embody in the federal constitution that parliamentary responsible government which had existed in the separate provinces for some twenty years already. But it was not sufficient to satisfy the Canadians of 1867. If things were never again to be put into the melting pot, if there was to be no further tearing up of foundations, it was necessary not only to embody in the Constitution the principles of British Government in their most advanced and developed form, but so to frame it that in the time to come Canadians might be free to develop those principles in their own way, to suit the changing needs of successive generations. Their task was, while firmly uniting the provinces into one Dominion, not to fetter her by too tight ligaments, but to give her a Constitution with which her sons might be satisfied 'while the British name lasts.' One pre-eminent point of interest in the British North America Act, in my opinion, is its adaptability to the future.

The first matter, therefore, to which I would refer, is the way in which this elasticity and adaptability was secured. We notice, to begin with, that no attempt is made to crystallize by statutory enactments the flexible system of precedents and conventions which made up the customary law of the British Constitution. All that side of the constitu-

tional life of this country is left free to develop in its natural way. Then I am convinced that that use of vague general language, and over-lapping descriptions in the sections which distribute legislative powers between the federal parliament and the provincial legislatures, which has sometimes been complained of, was resorted to with the well conceived intention of leaving these respective powers to adjust themselves more perfectly by degrees, and of allowing as free scope, as in the nature of the case was possible, for that process of organic growth of the national institutions, in harmony with the national needs and circumstances, which is one great virtue of the Constitution of the United Kingdom. To this we may attribute the fact that the provisions of the Federation Act relating to the distribution of legislative power have worked on the whole so satisfactorily; so that we hear no serious complaints from any quarter, and we get a popular newspaper like the *Toronto World* writing on the eve of last Dominion Day that we have a union of the provinces which is likely to prove perpetual.

Again the British North America Act gives both to the Dominion Parliament and to the provincial legislatures, not merely power to do certain things as in the case with Congress under the United States Constitution, but wide powers to make laws in relation to various broad subject-matters of legislation committed to their respective jurisdictions; and we find, moreover, no such hampering and restricting of legislative action by provisions of a fundamental law as is found in the Constitutions of the United States, and of the various States of the Union. The plenary power of our legislatures—though like all power liable to be abused—was essential if Canadians were to enjoy a political life as free and as vivid as that of the people of the United Kingdom.

And this brings me to another point of great and vital interest in our Constitution. I refer to the plenary power of the Dominion Parliament to make laws for the peace, order, and good government of Canada in relation to all matters not coming within the classes of subjects assigned exclusively to the legislatures of the provinces. The framers of our Constitution could not, of course, create a legislature precisely similar to the Parliament in Great Britain in respect to supreme control over all matters whatever

in Canada, because they were bringing into existence, not a legislative union, but a federal union; but in conferring this residuary power upon the Dominion Parliament they adhered as closely as possible to the British system in preference to that of the United States. They did what was possible to make Canada what I submit she was intended to be—and must be—an *imperium in imperio*.

But special interest attaches to the fact that the extent of this federal power has by no means been judicially determined as yet. Of course it does not extend to interference with the provincial powers, but outside that, does it extend to amending the provisions of the British North America Act itself? It is by no means clear that the view expressed in some cases that the action of the Dominion Parliament in this field is subject even to the express provisions of the British North America Act, save as to the provincial powers, is correct. No doubt it may be asked, how can the Dominion Parliament have the power to amend the Imperial Act which established it? The answer may be because the Imperial Act which created it gave it that power. So we come back to the question, does the power to make laws for the peace, order, and good government of Canada in relation to non-provincial subjects, include even this, or does it not? We must never forget that as the Privy Council declared, in a judgment which deserves to rank as one of the charters of our liberties, that the Federation Act conferred upon our legislatures authority as plenary and ample within the limits prescribed as the Imperial Parliament, in the plenitude of its power, possessed and could bestow. And I would submit, as no less a person than Lord Davey himself suggested in the course of an argument before the Board, that the Dominion Parliament might even change the federal Constitution, though not, of course, that of the provinces.

Then again, although it is true, no doubt, as a general statement, that the Dominion Parliament cannot legislate except for Dominion territory, yet this does not affect the power of the Imperial Parliament to give the legislatures of self-governing Dominions within the Empire, the power to pass statutes which shall operate outside their borders, though within those of the Empire itself. And the powers conferred upon the Australian Federation Parliament by

the Commonwealth of Australia Constitution Act suggest that no narrow construction should be given to this residuary Dominion power; for we find power conferred upon the Commonwealth Parliament to make laws for the peace, order, and good government of the Commonwealth 'with respect to fisheries in Australian waters beyond territorial limits,' 'with respect to external affairs,' and 'with respect to the relations of the Commonwealth with the islands of the Pacific.' The question of the power of the legislatures of the self-governing Dominions to legislate extra-territorially within the Empire, would seem, after all, to be merely a question of the construction of the Constitution which the Imperial Government or Parliament has conferred upon them respectively.

Moreover, bearing in mind the fact that the powers of the Dominion Parliament, as also of the provincial legislatures, are as plenary and ample within the limits prescribed by the Federation Act as the Imperial Parliament in the plenitude of its power possessed and could bestow, and that the expressed intention was to confer upon the Dominion a Constitution similar in principle to that of the United Kingdom, it seems that they must have the same power to bind their own subjects everywhere, as the Imperial Parliament has to bind all British subjects everywhere. For the expression 'subject of a colony' has high judicial authority, and, perhaps, may be taken to mean British subjects there domiciled. But in all this we are, as it were, looking forward beyond the stage which we have actually reached in the organic development of this Dominion and the Empire at large. I may stop here perhaps, for a moment, to mention a subject of special interest—the one point in which framers of the British North America Act obviously departed from the analogy of the British Constitution; and it has a special interest at the present moment. Their courage might seem to have failed them when it came to trusting the Dominion Government, or rather the Governor-General in Council, with any complete power of overcoming a dead-lock between the two Houses by recommending the King to add sufficient new members to the Senate to override its opposition. As everyone knows, the exercise of the prerogative power to appoint additional peers was effectively threatened at the time of the first Reform Bill in 1832: and was again threatened, according to rumour, at the time

of the recent Parliament Act. But the British North America Act, by sec. 26, expressly limits any such power to adding at most six members to the Senate.* It must be remembered, however, that as sec. 22 shews, there was intended to be a certain balance in the Senate between the different provinces, 24 from Ontario, 24 from Quebec, and 24 from the Maritime Provinces; and it may have been thought an unlimited power to recommend additional appointments would upset this federal aspect of the Upper House. Yet it seems clear that this could have been guarded against by providing that all additional appointments should be equally distributed between the above divisions.*

And now I must pass to a feature of our Constitution which cannot be omitted in any review, however superficial, of its points of special interest. I refer to the veto power of the Dominion Government over provincial legislation. Nothing of the sort is to be found in the Constitution of the United States, or in that of the Australian Commonwealth. And yet if the analogy of the British Constitution was to be observed, and at the same time the sound conception maintained of this Dominion as an *imperium in imperio*—or, as I would suggest, it might well be called, one of the Imperial Kingdoms—it was essential that this power should be conferred upon the federal government. But by what seems a perfectly sound and natural development of constitutional theory, a change of view has established itself since the early days of Confederation. Even as late as 1882 we find a Quebec appellate Judge stating that “the true check for the abuse of (provincial) powers, as distinguished from an unlawful exercise of them, is the power of the central government to disallow laws open to this reproach.” We may probably consider such a view as this now finally discarded. A series of decisions of the Judicial Committee of the Privy Council has established that the provinces, acting within the scope of their powers, are almost sovereign States; and we may perhaps say, with confidence, that a domestic constitutional convention has now established itself in the Dominion that the proper remedy for provincial legislation which is unfair, or unjust, or

*For an attempt in 1873 to have this power to add six members to the Senate exercised, and the refusal of the Imperial Government, on the ground that no sufficiently serious and permanent difference had arisen between the two Houses for which the limited creation of Senators, allowed by the Act, would be an adequate remedy, see Todd's Parl. Gov. in Brit. Col., 2nd ed., p. 204.

contrary to the principles which ought to govern the legislatures in dealing with private rights, is not the federal veto power, but an appeal to those by whom the legislature is elected. Anything else would mark an inferior phase of political life in the provinces to that enjoyed by the people of the United Kingdom. Yet just as there must, if the Imperial Union is to continue, be a reserve power in the Imperial Government to veto Acts of the King's self-governing Dominions beyond the sea where they seriously conflict with Imperial interests, or the honourable fulfilment of Imperial obligations, so it seems equally clear that if this *imperium in imperio*, the Dominion of Canada, is to be maintained, there must always remain a reserve power in the Federal Government to veto provincial legislation which seriously conflicts with the interests or the honour of the Dominion as a whole.

I must ask yet a few minutes to briefly refer to one more feature of the Constitution of this Dominion of special interest and immense importance. I mean the character of the exclusive powers expressly vested in the federal legislature, in which the framers of the British North America Act took warning from the experience of the United States to the lasting benefit of this country. Most important of all, perhaps, is the general power to regulate trade and commerce, supplemented by power over such subjects as are inseparably and vitally connected with trade and commerce, such as lines of steam and other ships, railways, canals, telegraphs and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province: navigation and shipping; banking, the incorporation of banks, and the issue of paper money; bills of exchange and promissory notes; and bankruptcy and insolvency. The United States possess no such powers as these over trade and commerce. As Mr. Z. A. Lash said in a weighty address recently delivered by him to the Toronto Board of Trade: "It does not require much consideration to see that to regulate efficiently the trade of a country the size of Canada or the United States, where the question of transportation and freight rates is of such vital importance, where discrimination may enrich one industry or section and ruin another, and where huge combinations may practically monopolize the necessities of life both in foods and

manufactures, there should be one general legislative power capable of dealing with all the important questions which are involved. In Canada we have such power in the Dominion Parliament. . . . With respect to the two great subjects of trade and transportation, a new comer from the United States of America comes to a country where under its Constitution power exists to pass efficient laws to guard against the evils which exist in the country he comes from, and he may well be satisfied with the change. This power has been exercised already in important instances such as the Act creating an all powerful Railway Commission, and the Act relating to the investigation of injurious trade combinations. Clear power exists to make such amendments and additions to these Acts as the public interest may from time to time require." And I may mention in this connection an interesting paper by Professor Leacock of the University of McGill, published among the proceedings of the American Political Science Association of 1900, which brings home to one to how great an extent the framers of the British North America Act, as compared with those of the Constitution of the United States, in fixing the exclusive legislative powers of the federal parliament minimised the disadvantages, in the economic and industrial sphere, which are inseparable from federal government and divided jurisdictions.

Then I must mention also the complete jurisdiction over the criminal law and procedure in criminal matters which is vested in the Dominion Parliament, whereas in the United States each State possesses this power, with the result that their criminal laws and procedure differ, and differ widely, in some instances, not only as to what constitutes a crime, but as to the trial of the offender and his punishment. On this subject Mr. Lash says in the address I have referred to: "We have not in Canada the scandals and delays and perversions of justice which are constantly in evidence in the States, in connection with criminal trials. Our criminal procedure is prompt and sure. Crime does not go unpunished, and no lynchings, because the power of the law fails, take place. No one can say of Canada as President Taft felt constrained to say publicly of the United States,—'I grieve for my country to say that the administration of criminal law in all the States of this Union (there may be one or two exceptions) is a disgrace to our civilization.' . . .

I firmly believe that, if the United States Constitution had granted to the central authority exclusive power over criminal law and procedure, Congress would have enacted such laws, applying to the whole country, as would have gone far to obviate the scandals and delays and perversions of justice, and lynchings, and make it impossible for any President of that great nation to utter the lament I have quoted."

Lastly, I will refer to that Dominion power over marriage and divorce, which has been so much before the minds of the public of late. In the first place that power gives the Federal Parliament jurisdiction to prescribe a general law of marriage. For although the Privy Council in a famous recent decision have held that, under the exclusive power confided to the provincial Legislatures to pass laws in relation to the 'solemnization of marriage in the province,' legislatures of each province can enact what shall be necessary to contract a valid marriage, if contracted in that province, the Privy Council have by no means held that if a couple find the requirements of their own province uncongenial to their religion or other principles, they cannot go and be married in some other province where the requirements suit them better, and so still contract a perfectly valid and binding marriage, which must be recognised as such throughout the Dominion, provided they comply with any requirements of the Federal marriage law. Then, on the other hand, by having exclusive control over divorce, Canadians are saved from liability to the eccentricities in that regard which characterize some of the States of the Union.

The conclusion of the whole matter, then, I think is this: that while the British North America Act leaves it to the future to settle such modifications as circumstances may dictate or the will of the people of Canada desire in the form of the relations of this Dominion to Great Britain and the Empire at large, it has provided for her domestic affairs a most wisely devised constitutional system under which Canadians possess all the freedom any people can desire to develop their own national life in their own way; and under which they may live free, contented, and prosperous, while the British name lasts,—and continue, after the manner of our ancestors, to fear God, love the brotherhood, and honour the King.

A. H. F. LEFROY.

CURRENT NOTES ON INTERNATIONAL LAWS.

CHINA'S REPUBLIC.

The delay in the recognition of the Chinese Republic appears to be occasioned mainly by the desire of the principal Powers to make the acceptance of loans on somewhat onerous terms by China a condition of recognition. It is not clear what is involved in the somewhat vague term "recognition." When used with regard to a new State, which is fighting for its separate existence, the word has a very definite meaning. It imports that, in spite of the rights of the parent State, the Power which accords "recognition" will enter into relations with the new State as an international entity. But in the case of an existing State like China, where there has merely taken place a change of Government, the phrase is meaningless. There is no parent State whose rights are in any way affected. China needs no "recognition." In her case the phrase simply means that the Power which is asked to accord "recognition" is asked to continue friendly relations with China under its new Government. It is not a new State.

Of course one State is perfectly entitled to discontinue official relations with another if it pleases. But so long as the established government is struggling to maintain itself, it would be inadmissible for any State whatever to assist those who are seeking to overthrow its rule. Contrary to Hall's opinion, the present writer believes that it is not improper for such a State to intervene in order to support the established government. For the latter represents the organization of the State: and it is this organism, and not the fortuitous population within its territorial limits, which foreign Powers are under a duty to respect. As long, therefore, as the position of the republican government was in any way actively assailed by the imperial forces, foreign nations might properly have intervened to support the latter. But nothing of the kind happened. The success of the new *régime* was immediate. The former government (in a fashion which must be extremely rare) formally constituted its successor. "Recognition," therefore, can do China no good in any legal sense. Intervention to restore the Manchus is evidently impossible, as well as illegal.

What is really meant, however, is that the Powers should resume their former diplomatic and consular intercourse with

China. Mr. Wu, in his well-drawn-up monograph on the subject, urges that stagnation of trade is the result of the present position. But this is surely rather the outcome of the prevalent uneasiness as to the stability of the Republic and as to its power to guarantee security, than of any informality in the intercourse of the government with foreign powers. Morally, however, the effect of the non-recognition of the new *régime* is deplorable. It can only be with ulterior motives of self-interest that the nations persist in holding aloof from the established government of a recognized State. It is understood that Brazil has been the first to break through this policy of exclusion: she will, no doubt, reap a reward in the shape of increased trade and good will in the Flowery Land.

"TITANIC" PROBLEMS.

The loss of the Titanic has inevitably produced a considerable amount of litigation. The claims, when life claims are taken into consideration, are naturally enormous, and the amount to which the owners can limit their liability (further than it is already limited by the fact of their forming a juristic person) becomes correspondingly important. Consequently, a limitation suit was commenced in the State of New York. In default of such process, the very considerable property of the owners within, and resorting to, that jurisdiction would be liable to execution on a judgment *in personam*, should such be obtained there or in England. Now limitation of liability is no part of the general maritime law. It rests on the legislation of individual States, and the legislations of New York and of Great Britain regulate it in different ways. Was the limitation, then, to be allowed at all? And if so, was it to be fixed by the law of England or the law of New York? These are very divergent. The English rule at £15 per ton would give the injured parties over £600,000. The United States rule, enacted in 1851, would accord them only the residuum after the collision, *i.e.*, about £20,000 worth of boats and freight.

The petitioners urged that it should be decided according to the *lex fori*. It is difficult to see the reason for this argument. The *lex fori* applies to questions of procedure; and it was thought a considerable stretch of the principle when it was applied in the shape of section 4 of the Statute of Frauds so as to render an unwritten contract worthless for purposes

of suit in England. As regards the limitation of liability, there is no question of mere procedure. Consequently the contest was really between applying the English rule or none. The Court (United States Court for the Southern District of New York, *cor.* Holt, J.) was evidently right in holding that to the case of injury inflicted on board a British ship on the high seas by alleged negligent collision with an iceberg, the British legislation applied. The case might have been different had a ship of another nationality been concerned. In that event, the English practice, until altered by legislation, was to disregard the limitation rule as inapplicable. (*The Carl Johan*, 3 Hagg. Adm. 186). In America, the view appears to have been held at one time that, at any rate upon surrender of the wreck, limitation of liability to the value of wreck and freight could be claimed in any event under the Act of 1851 as declaratory of the general maritime law: and in some cases unlimited liability was only admitted on proof of acts inconsistent with such a surrender. In the case of the Titanic's very old sister, the Atlantic (whose loss made such a sensation in the early seventies), limitation was allowed even in the case of a British steamer wrecked in Nova Scotia, on this sweeping theory of a "general maritime law" of limitation. (*Levinson v. O. S. N. Co.*, 15 Fed. Cas. 422; *cf.* *Marckwald v. Same*, 11 Hun. 462). But in *The Scotland* (105 U. S. 24), pending since 1866, and decided in 1881 by the Supreme Court of the United States, the theory in this extreme form was exploded. It was declared inapplicable to cases where one flag was alone concerned. However, it was somewhat illogically held to apply where different flags were involved. The same result was thus arrived at as was ultimately obtained in England by legislation. But it is difficult to accept as a "general maritime law," a rule introduced at a given moment by a municipal statute. It is not here a question of varying interpretations of a supposed common "general maritime law," but of applying as "general" law that which is perfectly well known to be particular law, introduced for the purpose of innovation.

"The rule exempting shipowners from liability on surrender of the ship and freight does not," says Holt, J., "seem ever to have been universally adopted throughout Europe. It is stated as a rule of Maritime law in the *Consolato del Mare*, . . . but there is no reference to such a rule in the Laws of Oleron or of Wisby, or of the Hanse towns. No such

rule was ever recognized in the English Courts, either of Admiralty or Common law, until the Act of 1813, which adopted the rule by statute; and it is now well settled that no such rule was ever in force in this country until the Act of 1851."

In *The Belgenland*, [1885] 114 U. S. 355), a modification was made in the doctrine of *The Scotland*. If the ships concerned had the same rule, that, and not the American, would be applied; and this was approved in *La Bourgogne* (210 U. S. 95). Nevertheless, in *The State of Virginia* (60 Fed. 1018), the American limitation was allowed to a British ship, wrecked in Canada, in spite of the qualification stated by the Supreme Court in *The Scotland Case*. In these circumstances the Court in the case of the *Titanic* rejected the American rule, and held the British limitation to be the correct one. The effect of the American statute was not, though it might have been, to displace the British rule in a case affecting solely a British ship.

TH. B.

THE "CARTHAGE" AND "MANOUBA."

Early in 1912 the Italians, during their war with Turkey, seized the C. G. T. *Carthage* on the ground that an aeroplane on board was destined for the Turkish forces in Tripoli. The ship's destination was Tunis; and the case shews the utter disorganization into which the trade of a neutral port may be thrown by the Declaration of London. By that instrument (on whose terms the Italians were acting) warlike *matériel* may be captured without any need to shew that the ship which is carrying them is actually bound for an enemy's port (Art. 30). Here we have the trade of Tunis threatened with complete interruption, in order that Italians might satisfy themselves that it was doing them no harm. It does not matter that aeroplanes are not within the Declaration's definition of warlike *matériel*; there are plenty of other objects which are. Had it not been for M. Poincaré's vigorous protests, this capture would have been the first of a long series. No one can suppose that the very moderate damages awarded a year subsequently would operate as a deterrent against such a course.

For the five days' detention of the *Carthage* £6,400 was found to be due (£1,000 of which was for the aviator, and the remainder nearly in equal proportions for the owners on the one hand, and the cargo-owners and passengers on the

other). In the *Manouba* case, 4,000 francs only were awarded. That vessel, *ex* Marseilles for Tunis, was seized on 19th January, 1912, and taken to Cagliari, in Sardinia, where 29 Turks, alleged to be carrying arms and cash to Tripoli, were taken out of her. They were really members of a Red Crescent mission; and here again the Declaration of London, allowing combatants to be seized on board any ship wherever destined (a provision (Art. 47) which it is amazing that a British Minister should ever have signed), gives occasion for serious interference with the communications of neutral ports. Even after the non-combatant character of these Turks was established, the Italians detained them. Not until 27th January, when the agreement of arbitration was concluded, were they released.

Now £160 is a ludicrous amount of damages in a case like the *Manouba*. The violation of French hospitality was serious. What future commander will hesitate to take drastic measures with neutral commerce if he is only involving his Government in the possible payment in the far distant future of £160? The real ground for satisfaction in these unpleasant cases is not the whitewashing judgment rendered on 6th May at the Hague, in which the Italians, like the Russian heroes of the Doggerbank, were exonerated from all culpability. It is the spirit which was evoked in France by the Italian action, and which prevented the recurrence of such autocratic acts of interference.

BETROTHALS AND MARRIAGES IN GERMANY.

A betrothal in Germany is a very important matter. When a couple become betrothed it is customary for the parties to exchange rings, and during the time of betrothal for the woman to wear the ring on the third finger of the left hand and the man to do likewise. After marriage the woman places the same ring on the third finger of the right hand, and the man does the same, as in Germany all married men wear wedding rings.

Whether a betrothal is in the nature of a contract or simply a promise by one party to marry the other is not at all clear, and the most eminent legal writers differ upon this point. The better opinion seems, however, to be that a betrothal is a contract by which two persons of opposite sexes promise to marry each other.

In Germany there is no breach of promise of marriage action as in England, as it is distinctly provided by the German Civil Code that no action can be brought to enforce specific performance of the marriage, and a promise by either party to the other to pay a certain sum as damages in case he or she does not enter into the marriage is a nullity.

In case, however, either party refuses to enter into the marriage, then he or she has to pay the other and to their respective parents, or to such persons as have stood in the place of parents, such damages as they have sustained by reason of having, in expectation of the marriage, incurred expense or entered into engagements in anticipation thereof. Further, the party in default has to compensate the other for any loss he or she has sustained in his or her property, or in his or her position, by anything he or she has done in anticipation of the marriage. The damage to be paid is only to be such as is reasonable under the circumstances of the case. Compensation need not however be paid if there was a good reason for either party refusing to marry the other. Should, for example, the intended bride give up a situation or refuse to accept one, then she is entitled to claim compensation for the loss she has sustained. Further, should one of the betrothed parties, through a wrongful act committed by him or her be the cause of the other withdrawing from the betrothal, then the party who is in fault must compensate the other in manner as hereinbefore mentioned. A woman who is

of blameless character and has permitted the man to whom she is betrothed to have carnal knowledge of her can, if the man withdraws from the betrothal or causes her withdrawal as hereinbefore mentioned, claim from him monetary damages. The claim to damages cannot be assigned and does not pass to the heirs unless the same is admitted by agreement, or an action has been commenced in respect thereof. It is not necessary that the woman should be *enceinte* in order that she may substantiate her claim, neither does it make any difference to her claim, should she have been the means of causing the man to seduce her.

In case no marriage takes place between the betrothed parties, each has the right to demand from the other, according to the provisions relating to the return of things or benefits acquired by a person who thereby unjustifiably enriches himself, the return of the presents given to him or her, or as a pledge of the betrothal. In cases of doubt, it is to be considered that the return of presents cannot be required if the betrothal has been put an end to by the death of one of the parties. Presents made before the betrothal need not be returned, neither need letters sent by the parties to each other, as they are not considered as presents. The claim, as hereinbefore mentioned, which either party to the betrothal has against each other is barred within two years after the determination of the betrothal.

As to marriages, it may be observed that a man cannot marry until he has attained full age, *i.e.*, the age of twenty-one years, and a woman the age of sixteen years; but a man can be declared by the Guardianship Court of full age when he is eighteen years old, and a woman can obtain a dispensation permitting her to marry before she has attained the age of sixteen years.

If a person is limited in disposing capacity, it is essential for him before he can contract a marriage to obtain the consent of his legal representative. Should the legal representative of such a person be his or her guardian, and refuse to give his consent, then the necessary consent may, on application by the person refused, be supplied or given by the Guardianship Court. The Guardianship Court must give its consent to the marriage if the same is for the applicant's benefit, and it is in the Court's discretion whether it will grant the application or not. A legitimate child until he or she has attained the age of twenty-one years requires the consent of

the father, an illegitimate child until it has attained a similar age, requires the consent of its mother to marry. In case the father is dead, or in case he loses his parental right according to paragraph 1701 of the German Civil Code, then the consent of the mother suffices. Paragraph 1701 provides that in case the father knew that the marriage was void at the time it was entered into, then he forfeits his parental rights and the paternal authority or power is vested in the mother. A child who has been declared legitimate does not in case of the father's death require the consent of the mother to marry. In cases where the father or mother are permanently unable to give the necessary declaration, or where it is absolutely impossible to obtain their addresses, then it is to be considered that they are dead. A marriage entered into without the necessary consent being first had and obtained is neither void nor voidable.

With respect to a child who has been adopted, the right to consent to the marriage of such a child is given to those who have adopted the child. Should a married couple jointly have adopted the child, or should one of the married persons have adopted the child of the other, then the law applicable as hereinbefore mentioned with respect to a legitimate child, with the exception of that portion which refers to a child declared to be legitimate, is applicable. Should the legal relationship which has arisen by adoption be determined, the natural parents do not again acquire their right of consent.

The consent required to be given by the parent cannot be given by his representative or agent. In case the father or mother is limited in disposing capacity, the consent of the legal representative or agent is not necessary. Thus, in case the person whose consent is required is only temporarily limited in disposing capacity, then the marriage of the infant could not take place until he attained the age of twenty-one, as the person who could give his consent is incapable of so doing, and his legal representative is likewise in a similar position.

Should the parent of a child of full age refuse his consent to the latter's marriage, then the Guardianship Court may on application by the infant supply such consent, and must do so if the consent has been refused without good cause or reason. The Court should, before it gives its decision, and provided there will be no great delay and no heavy costs will be incurred, hear the relations both by blood and marriage.

As a matter of fact, it is only in such cases where a person has been declared of full age before he or she has attained twenty-one, that the aforesaid application is necessary.

No person is allowed to marry before his previous marriage has been dissolved or declared a nullity. A marriage is dissolved by the death of one of the parties, by the remarriage of the husband or wife of a person who has been declared dead, or by divorce. Should persons who are already married, desire to re-marry, *e.g.*, by reason of there being some doubt as to the validity of the first marriage; there is no necessity that the marriage already entered into between the parties should be declared a nullity. Where an action is commenced for a declaration of nullity or of restitution against a judgment which has dissolved a marriage or declared the same as being a nullity, the parties thereto cannot contract another marriage until the suit so commenced as aforesaid is determined, unless the action has not been commenced until after the prescribed period of five years.

No marriage can be entered into between parties who are related by blood in the direct line, nor between brothers and sisters of full blood or half blood, nor between those who are related by marriage in the direct line. A marriage is void if entered into between relatives by blood or by marriage, contrary to the aforesaid provisions. Neither can persons, the one of whom has had illicit intercourse with parents, grandparents, or the descendants of the other, contract a marriage. If, however, such a marriage is entered into, the same is not a nullity, neither can proceedings be taken to set it aside. Relationship by blood within the meaning of the aforesaid provisions, exists between an illegitimate child and its descendants on the one side, and the father and his relations by blood on the other side, and this, though it is provided by the German Civil Code that no relationship exists between an illegitimate child and its father.

A person who has adopted another, cannot marry the person adopted or his or her descendants, so long as the legal relationship arising out of the adoption continues. Should persons who stand in the aforesaid relationship to each other contract a marriage, this does not effect the validity of the same, the only result is that the legal obligation which arose by the adoption comes to an end.

Further, a marriage cannot be entered into between a divorced person and the person with whom the divorced party

has committed adultery, if it is stated in the judgment that the adultery has been the ground of the divorce. A dispensation can however be granted by the proper authority, releasing the divorced person from the aforesaid provision. Should a marriage be contracted without obtaining the necessary dispensation, such marriage is void; but if after the marriage a dispensation is obtained, then such marriage is to be considered as valid from the commencement, *i.e.*, from the time the parties were married. Such dispensation, however, must be obtained before such a marriage has been dissolved or declared a nullity.

A woman cannot marry again until ten months from the dissolution of her marriage, *i.e.*, where the marriage has been determined by the death of her husband, or by divorce, or ten months from the time when the marriage has been declared a nullity, unless in the meantime she had given birth to a child. A dispensation, however, may be obtained by her, releasing her from these provisions. A person who has a legitimate child, which child is not of full age, or of which he is guardian, can only contract a marriage after the Guardianship Court has granted him a certificate that he has fulfilled the provisions of paragraph 1669 of the German Civil Code, or that he is released therefrom. Paragraph 1669 of the Code enacts, that in case the father is desirous of marrying again, then he must notify the Guardianship Court of such his intention, and at his own costs lodge with the Court an account or particulars of the property committed to his administration, and in so far as there is a community of the property between him and the child, he must arrange to settle matters. The Guardianship Court is, however, empowered to grant a settlement of the matter to take place after the marriage of the father. In the case of a continued community of goods where a participating descendant is not of full age or is under guardianship, the surviving spouse can only marry, after the Guardianship Court has granted him or her a certificate that he or she has fulfilled the obligations imposed upon him or her by paragraph 1493, sec. 2, of the German Civil Code, or that he or she is released from such obligations. Section 2 of the said paragraph enacts, that should the surviving spouse intend to re-marry, and a participating descendant is not of full age, or is under guardianship, then he or she must notify the Guardianship Court of such intention, and lodge an account or particulars of the common property with

the Court, dissolve the community of goods, and arrange to settle the matter. The Guardianship Court can order that the dissolution of the community of goods need not take place till the marriage is entered into, and postpone the time for settling matters.

Persons who are in military service, or in the service of the State, and who require permission to marry, cannot marry before obtaining such permission. Foreigners who, according to the State laws, require permission, or a certificate to marry, cannot marry before they have obtained such permission or certificate.

As to the form of marriage it may be observed that, before a marriage can be entered into, there must be what is called an "*Aufgebot*," which literally translated means "publication," but in an extended sense signifies all those preliminary proceedings which parties desirous of marrying must take in order to enable them to marry and which precede the marriage, thus: the parties must appear before the competent official or Registrar (*Standesbeamter*) and produce to him their baptismal and birth certificates, furnish him with particulars as to where they reside, occupation (if any), the names of their respective parents, etc.; upon which their names—after other minor formalities have taken place—are written on a list, and which list is hung outside of the town hall of the district in which the parties reside, and within a period of three weeks after the parties have given the aforesaid notice of their intention to marry, the marriage may be entered into. In case the marriage is not concluded within a period of six months after the notice or publication, then the notice becomes ineffective. Should one of the betrothed parties be so seriously ill as not to permit of a postponement of the marriage, then in such a case the notice or publication may be dispensed with. A dispensation may also be obtained from the proper authority rendering it unnecessary to make the publication.

The marriage is entered into by the parties appearing personally before the Registrar and respectively declaring in each other's presence that they intend to marry each other. This official must be prepared to accept the declaration. Such declaration must not be a conditional one or be made subject to any time limitation. The Registrar must, in the presence of two witnesses, ask the respective

parties intending to be married, each separately and one after the other, if they are desirous to marry each other, and after the parties have answered the question in the affirmative, then the Registrar states that, according to law they are legally married persons. Those persons who have been deprived of civil rights cannot during the period of deprivation act as witnesses, neither can such persons who are not of full age, but those who are related by blood or by marriage to one of the betrothed parties or to the Registrar may act as witnesses. The Registrar must make an entry of the marriage in the marriage register. The omission of the Registrar to ask the necessary questions or the declaration by him that the parties are married, the fact that two witnesses are not present, or that the witnesses were incompetent, does not affect the validity of the marriage.

The marriage should be entered into before a duly authorised Registrar. A competent Registrar is such an one in whose district one of the betrothed parties has his or her domicile or residence. If neither of the betrothed parties has his usual domicile or place of residence within the Empire, and if one of the parties is a German, then the highest authority of the State to which the party who is a German belongs, and which has the control of these matters, names the Registrar, and if the party belongs to no State, then the Imperial Chancellor designates him. If there are several Registrars who are competent to perform the marriage ceremony, the parties to the intended marriage can designate which one they please. Further, it is permitted to a Registrar of the proper district to give a written authority to the Registrar of another district to perform the marriage ceremony.

The marriage is in every case a civil one, but the parties, if they so desire, can have it followed by a religious ceremony.

HENRY HAPFOLD.

PERSONAL.

In answering the toast to himself at the banquet recently tendered him by the Winnipeg Bar, the Honourable C. J. Doherty, Minister of Justice, replied as follows:—

“I have felt no greater honour than the title of a member of this profession. Nothing in the last position of honour which was given to me has made it more valuable than the fact it extended the scope of my position as a member of the bar to all the provinces. I feel doubly sensible of the honour conferred upon me, entitling me to claim you all as my confreres of the Manitoba bar. I am sensible of the fact that the honour implied in this banquet is intended to be conferred rather upon the official position which I hold for the moment than upon the individual.

Doctors notoriously differ, but with lawyers, differing is a condition of their existence. If they all agreed, where would they be? Canada enjoys a character which calls for action on the part of him charged with its legal administration to be quite unbiased and uninfluenced by all political considerations of a party nature.

“The administration of justice forms a small part in the hands of the Minister of Justice, and the larger and more important part is in the hands of the Judges and practising members of the profession. It is something that is quite too sacred to be associated with the influence of party and political differences, and in the performance of the duties which fall upon the Minister he can certainly receive the most valuable assistance from the members of the profession, whether they sit on the bench or stand at the bar. My predecessors, to whatever party they belonged, have shewn their full appreciation of how far they should place themselves apart from party considerations where their duties call upon them to deal with questions affecting the administration of justice, and appreciation of the assistance which your profession can give, so that a minister in my position may fairly appeal to his confreres for assistance in his work. For my own part, I am glad to acknowledge my great indebtedness to the members who sit on the bench and those who practise at the bar for their valuable advice in connection with cases where it has been my duty to advise with regard to the exercise of clemency.

"There is a large field to afford assistance to the Minister of Justice. Those who sit on the bench and who practise at the bar are in daily contact with the working of that great machine, which we call the law, which is set and kept in operation to provide and secure that absolute justice shall prevail as between the citizens of this country.

Recognize of what immense value that assistance is in the work of ameliorating and making our laws better that justice may surely and more certainly prevail."

The honourable gentleman then touched upon their great field of observation in regard to those institutions where that punishment might be inflicted upon the guilty and the criminal, which society considered was necessary to inflict for its own protection. The clients of the Manitoba bar might generally go free, but there were exceptions, a fact which put them in the position to observe how these great institutions were carried on, so that they might remedy such defects as might exist. It was a field of study absolutely new to him, and was absolutely virgin soil he was starting to cultivate, and he appealed to all who could furnish him with light on that subject to give him the benefit of their knowledge. There were other fields in which the Minister of Justice could appeal to his confreres for aid in his work for the amelioration of their system of law. He was the guest of brethren in a noble profession, which in every civilized community, exercised a more widespread and potent influence in the guidance of public opinion than any other profession (Cheers). They collectively, bore upon their shoulders a grave responsibility, and if their influence was to be wielded for the good of their common country, he was sure that there was no member of the Manitoba bar who did not wish it to be so used.

Providence had showered bounteous gifts upon their country, and the people should build a foundation worthy of the promise which was given to them to be brought more closely together in the realization of the fact that they were one community, with common views and a common duty laid upon them to prove themselves worthy of the heritage which had descended upon them, and which it was their duty to hand down to their children, undiminished and increasing, not only from the point of view of substantial value but from the point of view of what went to make a truly civilized nation. Concluding his address the honourable

gentleman said:—"We can have one common Canadian Bar association. I have witnessed the annual gatherings of the American Bar association and have come fresh from that meeting and have seen the good work carried on in welding together the members of our profession from the different states of the great republic, making them realize how united they are in their studies and aspirations. It is written that the wise men came from the east, but we all know that wise men have settled in the west. They have established themselves in the very centre of Canada." He again thanked them warmly for the great kindness shewn to him by the Manitoba Bar, and trusted that it would not be his last visit to them.

H. A. Stewart, K.C., of Brockville, has been appointed as counsel for the Dominion Government, in the matter of the recently appointed commission. One of the chief duties of the commission will be to thoroughly investigate the conduct of the Kingston penitentiary in regard to which there has been much rumour, during the last few months. This investigation will be the first work of the commission, which meets in Kingston.

Kingston, Sept. 30.—The commission consisting of G. M. Macdonnell, Kingston; Joseph P. Downey, Orillia; and Dr. Etherington, Kingston; began at the court house to-day an investigation into the management of the Portsmouth Penitentiary, conduct of its officials and employees, and schemes for permanent reformation of convict, and maintenance of their dependents. A general invitation is extended to those who have anything to say on these subjects to present it before the commission.

Announcement to the effect that Mr. W. A. Macdonald, K.C., had accepted the appointment to the bench of the Supreme Court of British Columbia, has been confirmed. Mr. Macdonald was offered the appointment but did not definitely accept the position for several days. The official appointment is now only a matter of gazetting.

The new Justice of the Supreme Court was born in St. Catharines, Que., June 7, 1860, and is therefore 53 years of age. He was called to the Ontario Bar in 1882, but did not practice in that province, removing to Manitoba in that year soon after being called. He practiced in the

prairie province until 1897, and took a considerable part in provincial politics. In 1892 he defeated Hon. J. A. Smart and entered the Manitoba House to become leader of the Opposition. In 1896 he unsuccessfully contested the Federal seat of Brandon against Mr. D'Alton McCarthy.

Mr. Macdonald issued the first writ and held the first Assize Court brief in the western district of Manitoba.

In the fall of 1897 Mr. Macdonald moved further west and opened a law practice in Nelson. He was counsel for the Crow's Nest Pass Coal Company at the time the historic "Explosion cases," when 120 actions were fought in the Courts. He was city solicitor for Nelson at the time of the memorable contest between the corporation of that city and the West Kootenay Power and Light Company.

In 1909, Mr. Macdonald came to Vancouver, and formed a new office, Macdonald, Parkes and Anderson.

The new Supreme Court Justice took the silk in 1893.

Mr. J. M. McEvoy, K.C., a well-known London barrister, was quite seriously, though not dangerously, injured in an automobile accident in Buffalo, when a car in which he was riding skidded on a slippery pavement and overturned.

The re-organization of the legal branch of the House of Commons has taken place along the line recommended by a special commission, and Francis H. Grisborne, K.C., assistant Deputy Minister of Justice, has been appointed to the newly-created position of chief parliamentary counsel. He will do much the same work as was performed by A. H. O'Brien, as law clerk of the House. The latter position was abolished and Mr. O'Brien appointed a legal officer in the Department of Justice.

Henry L. Jordan, of the firm of Maclean, Jordan, Hollindrake and Moxon, barristers, National Trust Building, was appointed city solicitor at a special meeting of the city council held recently. The salary will be \$3,600 per annum.

It is announced that Mr. Walter G. Fisher has been appointed Judge of the County of Dufferin. Mr. Fisher has been for many years a member of the legal firm of

Fisher & Alliston, and was formerly Mayor of that town. The new Judge is well and favourably known to many of our citizens and is a sound lawyer. Owing to the many matters requiring immediate attention it is likely Judge Fisher will be sworn in at once. Several surrogate cases have to be passed on, Division Court suits have accumulated, and the Board of Criminal audit, of which the County Judge is ex-officio chairman meets on the 3rd of October. Judge Fisher is a man in the prime of life and will bring to bear on his judicial duties a ripe experience and recognized ability. The appointment should prove a most satisfactory one.

E. L. Elwood was recently sworn in as a Supreme Court Judge for the province of Saskatchewan by his honour Lt.-Gov. Brown in the presence of Chief Justice Haultain in private audience. He will take up his duties immediately.

Mr. Robert G. Barrett, barrister, resident of Toronto since 1854, died at his home at 187 Bloor street east in his ninety-first year.

Mr. Barrett was born in London, England, and with his brother, the late Dr. Barrett, of Upper Canada College, went to the southern States while quite young, afterwards coming to this city. He was a member of the Masonic Order, a Conservative in politics and was the oldest pew-holder in St. Paul's Anglican Church.

He is survived by four sons and four daughters, of whom one son and the daughters reside in Toronto.

The first session of the College of Law at the University of Saskatchewan was opened Wednesday, October 1st, 1913. Matriculation examinations will be held at the university September 16th for those who desire to qualify at that time.

The faculty of law is as follows:

President, Walter C. Murray, LL.D.

Arthur Moxon, B.A., B.C.L., (Oxford), professor of law.

Ira D. MacKay, Ph.D. (Cornell), LL.B. (Dal.), professor of law.

R. W. Shannon, M.A. (Queen's), lecturer on law.

Hon. T. H. McGuire, LL.B. (Queen's), lecturer on law.

The course leading to the degree of bachelor of laws covers three years and is thorough and complete.

The work of the year includes: 1, constitutional history; 2, contracts; 3, torts; 4, real property; 5, criminal law; 6, evidence.

The work of the second year includes; 1, constitutional law; 2, bills and notes; 3, equity; 4, jurisprudence; 5, evidence; 6, company law.

The work of the third year includes: 1, equity; 2, wills and successions; 3, conflict of laws; 4, partnership; 5, municipal law; 6, practice and procedure; 7, statute law and interpretation.

The course is devised to meet the needs of men who want to fit themselves thoroughly for a useful professional career, and may be made supplementary to an arts course in the university, or be taken in conjunction with such an arts course in six years, or be taken apart from and without such an arts course.

At the present time in Saskatoon there are twelve law offices providing an excellent opportunity for young men to be articled to good professional firms.

The faculty of law is now added to the faculty of arts, science and agriculture, and is an important step forward in the development of the University of Saskatchewan.

Students taking the law course at the university will have all the advantage of the invaluable education which comes from association with a large body of students of other faculties, and have the benefits of all special lectures, as well as enjoy the opportunities to take regular courses of study which are not supplementary to the law course but of great value to a young man wanting a thorough education.

The law faculty is a strong one and the regular lectures will be supplemented by other lecturers to be announced from time to time during the term, and who will include judicial and legal men of note in western Canada.

Between forty and fifty law students were enrolled recently as students of the new law school to be opened in Regina in the near future. Mr. T. D. Brown, principal of the new school, stated that he was more than surprised to find so many young men enrolling. He thought thirty would have been a large number with which to start, and he was not looking for more than that number of scholars on the commencement.

The first day on which it was possible for students to enroll, and the large number of students to sign up at the offset only served to shew the need which young lawyers have felt for such a school. Now that so many applications have been received, Mr. Brown is looking for the number to be increased materially during the next few days. He knows of several young men who are anticipating joining, but who did not enroll.

Classes will commence with the opening of the school and will continue with but slight interruptions until about the 1st of April, 1914. The term is a six months one, and in order to cover all the work in the time allotted it is necessary to commence operations at an early date, and continue right through the entire time with but few holidays. There will be short holidays at Christmas, but with the exception of these no holidays will be observed excepting statutory ones.

W. G. Fisher, of Alliston, becomes County Judge of the county of Dufferin; Hon. A. McPhillips, of Victoria, B.C., president of the council in the McBride Government, is made a Judge of Appeal for British Columbia, and E. L. Elwood, of Moosomin, is appointed Judge of the Supreme Court of Saskatchewan.

Mr. Horace Thorne, who was well known to business men of the city, died recently of typhoid fever after a short illness in Buffalo. At his bedside were his daughter, Miss Elsie Thorne, and his two sons, Harold, of Toronto, and Stuart, of Cobalt.

The late Mr. Thorne was a member of a family long prominent in Toronto. His father, Benjamin Thorne, came to Canada from Sherbourne, England, in the early years of last century, and settled up Yonge street, on the site of the village now named Thornhill in his honor. There he conducted mills, and was elected a director of the Bank of Montreal, and there he died in 1848, leaving a very considerable property to his descendants. Mr. Horace Thorne was born 70 years ago in the old homestead which still stands in Thornhill. For a number of years he practised law, and later he became known as a successful real estate operator.

Judge Thomas Ambrose Milne Gorham of Milton died after a long illness. He is survived by a widow and one daughter, aged seven years.

Before his elevation to the county bench twelve years ago, he practiced law in Port Arthur. As a student he was in Sir Oliver Mowat's firm. He was born 59 years ago in Newmarket.

The Benchers of the Law Society of Upper Canada will meet in Toronto again shortly and elect a successor to the late Mr. Glenn, K.C., who was Police Magistrate of St. Thomas. In all probability, S. G. McKay, K.C., of Woodstock, will be chosen. He is a prominent member of the western Ontario Bar.

The Board of County Judges for Ontario, which consists of His Honour Judge McDonald, Brockville, Chairman; Judge Chadwick, Guelph; Judge Hardy, Brantford; Judge Huycke, Peterborough; Judge Harding, Lindsay, and J. B. MacDonald, inspector of Division Courts, met the committee of the Supreme Court Judges at Osgoode Hall for the purpose of considering the rules of practice and tariff of costs applicable to the Surrogate Courts. Those present on behalf of the Supreme Court were: Sir William Meredith, Chief Justice of Ontario; Mr. Justice Latchford, Mr. Justice Middleton and Mr. Justice Kelly. The matters in question were discussed at length, and various suggestions and recommendations made in respect of the matters submitted by the County Judges' Board. The work of the board in regard to County and Division Courts has been completed, but the Surrogate Court work is not expected to be completed till the November meeting of the board.

The following local appointments appear in the *Quebec Official Gazette*, five new justices of the peace being named for the district of Montreal.

Robert Bennett Hutchison, notary, of the city of Montreal, to be Registrar of the registration division of Montreal West.

The following are named justices of the peace:

District of Montreal:—Fred. W. Beaufield, Fred. A. Bourne, George F. Aucrum, Grand Trunk Railway Company's employees, of Montreal, and Alexandre Coaillier, con-

tractor, of the village of Boucherville; William Kearney, gentleman, of Westmount.

Incensed at the action of the Saskatchewan Benchers in making attendance compulsory at the law school to be opened at Regina on October 1st, members of the local Law Students' Society at their annual meeting will discuss the question of organized opposition to the new rules. Almost without exception the students declare that they are opposed to the mandate of the Benchers.

According to the circular recently sent out by the Benchers, all Regina students must attend the school, although for students in other parts of the province the course is optional. Payment of annual fees amounting to \$50 is required and students will be obliged to put aside any other work which they may have on hand in order to attend at least a proportion of the lectures.

Obedience to the order would involve hardship to a great majority of the students articulated in the offices of Regina, in the opinion of a number who were interviewed by *The Leader*. Many are at the last extremity to meet expenses during the time they are articulated.

Mr. R. de B. M. Bird, one of the students, when interviewed stated that in the opinion of most of the students attendance at the school should be made optional, at least for those already articulated. If the present rule is maintained he declares he will be compelled to give up the study of law in Saskatchewan and there are many in a similar position he declares. It is possible that a petition to the Law Society may be drawn up asking them to arrange for evening classes in order that the students may be able to attend them without loss of salary, to make the classes optional, and to reduce the fees. Unless these demands are complied with the students may organize a boycott of the classes and then apply for a mandamus to compel the Benchers to permit them to try their examinations.

At the annual meeting of the Calgary law students' society held at the court house on Thursday afternoon, September 11th, the following officers were elected: Honorary president, His Lordship Mr. Justice Walsh; patron, M. S. McCarthy, K.C.; president, H. E. Forster; first counsellor, G. E. Fraser; second counsellor, W. J. Reilly; third counsellor, N. D. Dingle; secretary-treasurer, C. A. Coughlin.

The following students of the Ontario Law School have passed their supplemental examinations:—

First year—J. S. McLaughlin, Arthur Johnson, R. A. Patchell, H. McConnell, W. B. McPherson, W. A. McCarthy, W. F. Greig, D. E. Dean, S. H. Brown, E. A. Hay, O. A. Lauzon.

Second year—D. D. McLeod.

Third year—D. Campbell, N. L. Croome, F. E. Higgerty, F. H. Hurley, R. Phillips, A. B. Currey.

Active campaigning is now in force among the law students of the city, on the occasion of the contest for the presidency of the Vancouver Law Students' Society. As the successful candidate has the privilege of nominating his officers for the half year, the contest is really a contest of administrations.

Both parties are radical in name and claim to be so in nature. The candidate for the Lex-Lux party is Mr. Gerald C. McGeer, and that of the Progressive party Mr. Donald McDonald. Both of the candidates are able debaters, and the joint campaign meeting at the court house at which the candidates and several supporters spoke, provided very good entertainment.

Each of the parties has drafted a platform outlining the social and educational reforms they pledge themselves to bring in for the benefit of the society. The Lex-Lux party is making a feature of its negotiations with the Benchers of the Law Society for the immediate establishment of a temporary law school pending the erection and establishment of the permanent law school in connection with the university.

Recently the Benchers invited the students to furnish them with a report, stating their needs and suggestions, and what proposals they would make to assist in the establishment of a temporary law school. This report is to be considered at the next meeting of the benchers, when it is anticipated that several lectureships in law will be established for the benefit of the Vancouver law students.

Six barrister members of the British Parliamentary party, two of whom, Donald MacMaster and Hamar Greenwood, are Canadians, have been admitted to the New South Wales Bar. The honor was conferred on the motion of the Attorney-General.

A feature of the banquet given in the evening was the speech of Admiral King Hall, Commander-in-Chief, who praised the Australian naval policy as the only practical one and emphasized the Imperial character of the fleet.

On that morning a few weeks ago when the plan was laid which put Harry Thaw back on American soil, where he belonged, no doubt one of the chief planners of the coup was Edmund Leslie Newcombe, C.M.G., Deputy Minister of Justice. Hon. C. J. Doherty and Hon. Arthur Meighen are fine lawyers; but the permanent head of the Department of Justice is not outclassed in their company. His opinion is always listened to with respect, whenever a difficult legal question is up for discussion. He had made a name before he entered the Government service, twenty years since, and he has added to his laurels on many occasions in the interval. So that, without detracting anything from his political chiefs, there is little doubt that he had a considerable hand in ridding the Dominion of the "undesirable" Thaw.

Edmund Leslie Newcombe is a lawyer in every inch of his nearly six feet. When one sees him pleading a case before the Supreme Court there is a distinct feeling of surprise and disappointment that he does not wear the wig of dignity so dear to the English barrister. He is as dignified as Mr. Tulkinghorn, the trusted family lawyer and guardian of the Dedlocks in Bleak House. He must appear in quite his right element when he dons wig and gown before the Privy Council in old London.

Like many other wise men, the permanent head of the Federal legal department comes from the East. He was born in Cornwallis, Nova Scotia, on February 17, 1859, so that he is now just a little beyond the half-century. He was educated at Dalhousie College—one of the oldest colleges of the Dominion—and at Halifax University, and was called to the bar at the age of twenty-four. For the next ten years he practiced his profession in Halifax, winning a high place among the lawyers of his native province. When only twenty-eight he was made a governor of his old college, and later lectured to her students on insurance law. The man who picked him out for the Dominion service was Sir John Thompson, himself one of the greatest

masters of the law Canada has ever produced. Subsequent years have shewn that Thompson knew men as well as law.

One of the special problems which the new Deputy attacked was the tangled skein of the law in regard to the publishing of books. The relations on this subject as between the Dominion and the Imperial Parliament are highly involved, and have been the subject of much negotiation—negotiations which have sometimes been rather bitter and which have been marked by the disallowance of Canadian laws by the Imperial authorities. Two years after he came to Ottawa Mr. Newcombe was sent as the representative of Canada to confer with the Imperial Government on this subject. Afterwards there were many conferences, and in them the Deputy Minister usually had a part. The problem was settled shortly after the Laurier Government went out of office, but the solution has never yet been put into statutory form.

Another outstanding service which Mr. Newcombe has been able to perform for the country was in connection with the last revision and consolidation of the Dominion statutes. For four years he and his seven fellow-commissioners were at work. They had before them the task of consolidating all the laws passed by the Dominion Parliament from the previous revision in 1886, and when they had finished their work was put in three compact volumes—the index to it alone made a fourth volume. Until this work was done lawyers had to search through all the Acts of each year to find the law; now the compendium of 1906, enacted into law by a Dominion Parliament, is the final source. This is a great saving to the lawyers and their clients, for if the lawyers had to spend more time on a case, one may be sure the client would pay the bill.

The "D. M. J.," to describe him by his title, is a member of a couple of clubs, and occasionally goes into the wilds on a hunting trip. But really he appears to find his amusement as well as his labour in law. As a reward for this he is the highest paid deputy minister in the service. He now draws \$10,000 a year, while the regular salary of deputies is only half that. In addition he is also paid for legal services before the Courts. For example, he was paid \$1,565 and \$1,165 respectively for two trips made to England in 1911; a good part of this would, of course, be for expenses. The explanation of the high pay is that it has

been necessary to retain so efficient a lawyer in the service of the Government. Even at that his remuneration is moderate for a first-class lawyer. Incidentally one may remark that the principle is one that will have to be applied in other departments, if the people are to retain the services of leaders in the various vocations.

On the first-year register of the Ontario Law School are indications of an imminent militancy in the jurisprudence of this province.

These four names appear: Miss Charlotte Wegg, B.A., St. Thomas; Miss Gertrude Alford, matriculant, Belleville; Miss Mary Mabel Maund, of Kingston; Miss Lena Oliver Richardson, of Toronto.

The Misses Maund and Richardson, matriculants, may report later in the term.

The second-year students include Mrs. H. V. Laughton, formerly Miss Mary Buckley, and Miss Edith Louise Paterson, of Vancouver. Not only is Mrs. Laughton continuing her legal studies, but her husband is a barrister practicing in Toronto.

Miss Paterson won a scholarship in her first year in a class of one hundred.

The Law School this term is the busiest Blackstonian mill in all its history. The first year class has a muster of 118, the largest ever, and a roll of 125 is expected.

The strength of the three classes, first, second and third years, will exceed the 300 mark.

Mr. Howard S. Ross, K.C., and Mr. Eugene R. Angers, formerly connected with the firm of Brosseau, Brosseau, Tansey and Angers, have entered into partnership. Mr. Angers is a son of the late Real Angers, who in his lifetime was a partner in the wholesale hardware firm of Frothingham and Workman. Mr. Angers studied a few years at the High School in Montreal and took his degree of B. A. at the St. Mary's College. He studied law at Laval University where he graduated with high honours in 1907 and was admitted to the bar the same year.

Enrollment of law students for the University of Saskatchewan took place recently. Professors Monon and MacKay have been engaged as lecturers, and will be assisted

by P. A. McKenzie and later by R. W. Shannon. Accountants will be registered for the subjects of interest to them so that it will be easy on the students entering.

A formal order in council has been made appointing Mr. W. A. Macdonald, K.C., to the bench of the Supreme Court of British Columbia.

Hon. A. E. McPhillips, president of the executive council of the provincial government, has been appointed Judge of the Court of Appeal of British Columbia. Announcement of this fact was conveyed to the city in a despatch from Ottawa. The appointment was passed by the Cabinet on Thursday, but was not signed by the Deputy Governor-General, Sir Charles Fitzpatrick, until Saturday. By the appointment it means that five Judges instead of four, as heretofore, will sit on the provincial Appeal Court.

It now remains for an additional Supreme and County Court Judge to be appointed as contemplated by the Government. Consideration on these two appointments will probably be taken up by Hon. C. J. Doherty, Minister of Justice, when he arrives on the Coast shortly.

Mr. McPhillips came to British Columbia about twenty years ago. He was previously a member of the Manitoba bar. He has sat in the local legislature for thirteen years, being a member of two ministries and of four legislatures.

The Cabinet has also appointed Mr. E. L. Elwood, K.C., of Moosomin, Saskatchewan, to the Supreme Court of Saskatchewan, while Mr. W. C. Fisher, of Alliston, Ontario, has been appointed Judge of the County Court of Dufferin.

Sentence of one year's imprisonment was on Saturday passed by Judge McInnes on E. J. Busey, found guilty earlier in the week of misappropriating funds of Messrs. Cope & Son, by whom he was employed as accountant.

Geo. M. Vance, K.C., of Shelburne, who, it was rumoured, would become County Judge of Dufferin, will, it is now understood, receive the appointment of County Judge of the County of Simcoe. Another appointment likely to be made within a day or two is that

of C. S. Livingston, of Tilsonburg, to the county judgeship in Welland.

An amount will be put in the estimates at next session of parliament to provide for an increase in salaries of Ontario county Judges.

The whole judicial system will be revised, and Hon. Mr. Doherty, Minister of Justice, who favours the creation of a Dominion bar association, is now looking into the judicial systems in the western provinces.

The Ontario county Judges have delegated Judge McTavish and Judge Gunn of Ottawa, two of the most distinguished men on the Ontario bench, to arrange details with the Minister of Justice and Solicitor-General Meighen.

Right Hon. R. L. Borden, Prime Minister, who succeeded the late Sir John Thompson as leader of the Nova Scotia bar, before he entered politics, is heartily in accord with the proposed reform of the judiciary. The age limit has been put at 75 years, and every Judge 30 years on the bench will be retired on superannuation.

WILL DISCOVERED AFTER SALE BY ADMINISTRATOR.

The case of *Hewson v. Shelley*, which for three and a half days occupied the attention of Mr. Justice Astbury, is one of extraordinary interest for conveyancers. The owner of certain freehold property named Barley Wood was supposed to have died intestate, and his widow took out letters of administration to him. The debts, duties, and funeral and testamentary expenses having been all paid, the administratrix, under the Land Transfer Act 1897, sold Barley Wood. Part of the proceeds was invested so as to form a fund to answer the widow's dower, and the remainder was divided between three co-heiresses. On the death of the widow, a will of the supposed intestate was found, more than twelve years after his death, but less than twelve years after the sale. This will gave all the testator's property to his widow for life, and after her death gave Barley Wood to G. The executors named in the will were the widow, G., and another. It is elementary law that executors derive their title from the will and not from the probate. Consequently Barley Wood vested in the executors at the death of the supposed intestate, and they, after the letters had been revoked and probate granted, took proceedings against the purchaser on the ground that he had bought the property from a person who had no right to sell it to him. One of the most recent authorities on the subject is the case of *Ellis v. Ellis* (92 L. T. Rep. 727; (1905), 1 Ch. 613), where Mr. Justice Warrington expressed himself thus: "Unfortunately for the plaintiffs there was in existence a will by which an executor was appointed; that will was duly proved, and the administration was revoked. Under those circumstances, I think it is clear law that the grant of administration is wholly void, and that, speaking generally, dispositions of the assets by the supposed administrator are void also, the ground of this being that the assets are vested in the executor from the death, and the supposed administrator has no property in them and no power of dealing with them." There is a curious distinction between such a case and a case where there is a will but no executors of it were appointed. In *Boxall v. Boxall* (51 L. T. Rep. 771; 27 Ch. Div. 220), Mr. Justice Kay upheld a sale of leaseholds by an

administratrix, though a will was afterwards discovered which did not appoint executors. That learned Judge referred to the old case of *Abram v. Cunningham* (2 Lev. 182), decided in the reign of Charles II., and said "The report, like many reports of that time, has a short note of the judgment not containing any reasons. But the argument is given at some length, and in it reliance was placed chiefly on the fact that the concealed will had appointed executors, who therefore had a right of property vested in them before probate, and this, I gather, was the ground of the decision. No stress seems to have been laid upon the fraud committed in concealing the will; and, indeed, where the question was whether a third person should suffer who had acquired the property in good faith from an administrator apparently duly constituted, it would not be reasonable to visit him with the consequences of a concealment to which he was no party."

Although, where the will appoints executors, the grant of administration is spoken of as wholly void, certain acts of the administrator are protected. "It would seem, however, that, as between the rightful representative and a person to whom the executor or administrator, under a void probate or grant of letters, has aliened the effects of the deceased, the act of alienation, *if done in the due course of administration*, shall not be void. Thus in the case of *Graybrook v. Fox*" (Plowd. 275, Temp. Eliz.), "it was laid down by the Court, that if the sale had been made to discharge funeral expenses or debts, which the executor or administrator was compellable to pay, the sale would have been indefeasible for ever." (Williams on Executors, 10th ed., p. 462). This is reasonable, as, since the executor would have been obliged to pay the funeral and testamentary expenses and debts of the deceased, he must be taken to have adopted the acts of the administrator in paying them. There are also certain provisions of the Probate Act 1857 to be considered. Sec. 77 provides for all payments *bonâ fide* made to any executor or administrator under a revoked probate or administration, before revocation, being lawful discharges, and for all payments made by such executor or administrator "which the person to whom probate or administration shall be afterwards granted might have lawfully made" being good. Sec. 78 enacts that "all persons and corporations making or permitting to be made any payment or transfer *bonâ fide* upon any probate or letters of administration granted in respect

of the estate of any deceased person under the authority of this Act shall be indemnified and protected in so doing, notwithstanding any defect or circumstance whatsoever affecting the validity of such probate or letters of administration." If it were not for some such provisions, no one could safely pay a debt due to the testator's estate to an administrator or executor, as the testator's will or a later one might at any time be discovered and proved, and the debt might have been paid to the wrong person.

In *The Goods of J. Wright* (68 L. T. Rep. 25; (1893), p. 21), an application was made to the Probate Division for a grant of administration until a will was found. The widow of the deceased had stated that he had made a will, but that it had been accidentally destroyed. It was believed that the widow was not in England. Mr. Justice Gorell Barnes (as he then was) said that a grant *ad colligenda* would not be sufficient, as there did not seem to be much chance of the will turning up, and a grant of administration was made until the original will or an authentic copy thereof should be brought into the registry, limited to dealing with and completing the sale of certain leasehold houses and giving a discharge for the purchase money thereof. Probably the alleged will in that case was never discovered. Otherwise, there might have been a question whether the purchasers got a good title from the limited administrator. If the proceeds of sale were employed in due course of administration, they presumably would, and the order of the Court expressly referring to the sale might in any case have protected them.

In *Hewson v. Shelley* it was argued that as under the Land Transfer Act 1897 an administrator can sell realty for the payment of debts, &c., and it is not the practice for purchasers to inquire if there are debts, &c., in existence, the purchaser was protected, seeing that the proceeds might have been employed in the due course of administration. The learned Judge, however, brushed these arguments aside, as well as those which dealt with the possible sale for the purpose of raising money owing to the widow for estate duty or an improvement charge paid by her, on the ground that as a matter of fact the land was not sold for any such purposes.

The sale in question, though in form by the administratrix, was in reality by the widow and co-heiresses, who had consented to the sale of the land which they supposed was

theirs. His Lordship, though fully sensible of the hardship on the purchaser, had no alternative but to give judgment for recovery of the premises by the executors and for an account of rents and profits since the widow's death. The fund set apart to meet the dower was with the consent of the plaintiffs ordered to be paid to the purchaser in exchange for the title deeds.'

It is difficult to see how, at any rate, a Judge of first instance, in the present state of the authorities, could come to any other conclusion, but the question which will now trouble conveyancers is: Can they safely accept titles from legal personal representatives or from persons who claim through recent purchasers from them? A will, or a later will, or even a codicil may afterwards turn up, and if it appoints executors or fresh executors the title may be bad. Yet, if they refuse to complete, the Court may, and presumably would, decree specific performance. Possibly a practice may grow up of purchasers requiring personal representatives to show that they are selling for payment of debts, &c., or of purchasers insuring at Lloyd's against the risk of such sales being set aside. Possibly, the Legislature, in its wisdom, may intervene and, in effect, guarantee the sale by executors or administrators if made before the probate is or letters are revoked. It is, of course, hard on the devisee if the property to which he is entitled under the will or codicil does not come to him, as it has been sold by the administrator or wrong executor, but then he is merely a volunteer, an object of the testator's bounty, while the purchaser has actually paid good money for it and is so much the poorer. Both are innocent parties, but the purchaser is the more entitled to our sympathy.

THE ANNOTATOR'S PROBLEM.

BY GEORGE H. PARMELE.

[**EO NOTE.**—This is the third of a noteworthy series of articles by different authors on the evolution of the modern law book and its changing forms and methods to meet the problems of the practitioner. The first article appeared in the July Case and Comment.]

The lawyer preparing a brief, or the Judge writing an opinion, deals with a definite question, limited and defined by the facts of the individual case before him. He need concern himself only with those difficulties and complexities of the subject which are presented by those facts.

The annotator has a much broader field. He has to deal with a wide range of facts, embracing, so far as they are essential, vital, and of differentiating value, the facts of all the adjudicated cases that fall within the scope of his note. and to anticipate, so far as he may, new combinations of facts and circumstances that may arise in the user's practice.

Modern annotation, at least as prepared for selected cases, is not primarily academic, but practical. It should, indeed, comprehend a logical and lucid statement of the broad, underlying principles of law governing the subject treated. In this respect it will serve the needs of the student as well as those of the lawyer. It should not, however, be primarily or chiefly elementary. The treatment must, of course, be as simple and clear as is consistent with the complications and complexities of the subject; but difficulties and refinements inherent in the cases should not, out of tenderness for the superficial reader, be ignored or glossed over in order to present a result that may be quickly and easily grasped.

The mere grouping or massing of cases under broad statements of principles and rules, with but a bare suggestion of specific applications, contradictions, limitations, and distinctions, is easily accomplished, and sometimes not unattractive to the merely academic reader, but will prove but a feeble aid to the lawyer having a practical question to argue, or to the Judge having such a question to decide.

The proper preparation of a note requires a minute and careful examination of each of the cases cited therein, and generally of many cases which, upon a close examination, are found not to be in point, and are consequently discarded

The annotator must discriminate between the facts of the case which are merely accidental or incidental, and those which are essential and vital; he must know not only the result reached in the case, but also the grounds of the decision and the principle to which it is referred. The collation of cases with reference merely to final results, and without careful examination of the principles and grounds of decision, is fraught with exceeding danger to the user. It frequently leads to the indiscriminate intermingling, in support of a proposition, of cases that do support it with those that lend no support whatever to it, or are even directly opposed to it. Illustrations are legion. A convenient one is afforded by the question whether the declarations of a by-stander who had otherwise no part in the transaction are ever admissible as *res gestæ*. In some treatises cases sustaining the negative of that proposition are mingled indiscriminately with cases that merely excluded the declarations of the by-stander because they did not in other respects meet the requirements of the rule as to *res gestæ*.

Not only must the annotator indicate the specific applications of general principles, distinctions, limitations, and exceptions as they are affirmatively and expressly presented in the individual cases examined, but he must also, from his comparative study, preserve those which are implicit and appear negatively only. For example, having observed a certain distinction expressly made by one or more of the cases, or such a distinction having occurred to him independently, he must not only trace it through the cases which expressly adopt it or reject it, but he must examine with reference to it all the cases that fall within the scope of his note, to ascertain whether upon the facts involved they may or may not be reconciled with it. At that point may be noted the great advantage the annotator, from his comparative study of the cases, enjoys over the digester, who deals with each case as a unit and without reference to other cases on the same subject. The annotator comes to a case with the knowledge, perhaps, that other cases have ingrafted certain limitations or distinctions upon the general principle which the opinion in the case in question appears to sustain in its broadest and most unqualified form. Examining the facts of the case in the light of his study of the other cases, he often finds that the Court was only called upon to sustain the principle in its limited and qualified form, and that,

while not expressly or in terms so limited, the case cannot be properly regarded as an authority beyond that point.

Having subjected the individual cases to a critical analysis and comparison, the annotator must proceed by a careful, synthetical process to combine the results of his study in as clear and homogeneous a treatment as possible, exercising great care on the one hand to avoid mere repetitions of the same point under slight changes of form, and, on the other hand, to preserve the real and essential value of the cases, either by grouping with proper limitations and due regard to vital points of difference, or, if necessary, by separate statements with regard to individual cases. The nature of the subject and the extent and character of its complexities, must determine the final form which the note will assume.

While the expression of his own views and conclusions, drawn from a study of the cases and his own reflection upon them, is clearly within the province of the annotator, he should never allow the strength of his own convictions to deter him from developing and presenting the full strength of the cases on either side of the question. The ultimate aim of annotation, as of all legal work, should doubtless be the vindication, establishment, and exemplification of sound and just principles and rules of law. But, so long at least as the Courts are regarded as the final arbiters of the law, the annotator may best contribute to this end by so presenting the cases that have dealt with his subject as to give every lawyer, whatever aspect of the question he may have, or whatever his particular state of facts may be, every possible chance of establishing his contention, which the cases, by a careful and searching analysis and comparison, may be made to yield him.

In the measure in which this is done by the annotator, the Court, when it comes to decide the case, is afforded the opportunity of testing its conclusions, not merely by the generalizations of other Courts or text-writers, or of the annotator himself, framed, perhaps, without any conscious intention of dealing with the essential phase of the question or point of view presented in the instant case, but by specific and detailed decisions, in rendering which the Courts have necessarily dealt with the considerations peculiar to the particular aspect of the question under consideration. In the same measure the Court is aided in formulating its own

statement of the law with precision and accuracy, and with due regard for proper limitations and restrictions imposed by the particular question before it, thus making its proper contribution to a consistent, but carefully discriminating, body of law.

THE FRENCH JUDICIAL SYSTEM.

I.—CIVIL.

The North and South Poles are no nearer each other than are many of the principles of justice and procedure of England and the United States to those of France, and, in fact, to those prevailing as a rule in Latin countries. It is not only the divergence in many elementary principles, but the manner of their enforcement—the different way of regarding and dealing with fundamental ideas of right and wrong and of the best methods of ascertaining the truth—that makes it so difficult for the Anglo-Saxon to understand French jurisprudence and the administration of justice in France. Although at first view the Anglo-Saxon is apt to derive the notion that justice between man and man is not evenly administered under a system so completely divergent from his own, yet with experience and a closer knowledge he soon realises that the scales of justice in France are as evenly balanced as in his own land. But for the stranger to come to this conclusion takes time; it requires an understanding of the constitution, jurisdiction, and operation of the various Courts, the rules of procedure, and the administration of justice.

While French civil practice differs materially from that of American and English Courts, yet the machinery of the French system in the end is capable of accomplishing all that a litigant can attain by those more cumbersome methods, and with far less trouble, annoyance, and money. Speed and simplicity are the predominant features of French procedure.

The French civil judicial system, in many respects, has its advantage over that of England and the United States, as, for example, in the rapidity in which commercial disputes can be settled and the comparative small expense entailed; in the production of evidence; in the absence of

those technical questions on the admission of testimony that fill our law reports, and in pleadings that, although regulated by and confined to well-established rules, are not subject to those interminable controversies with which the English and American lawyer is so familiar. In many other ways, however, such as pressing a judgment debtor, and enforcing a judgment when obtained, French procedure lacks those vigorous methods of pursuit peculiar to Anglo-Saxon procedure, and consequently too often enables an adroit, unprincipled debtor, although capable of liquidating his debt, to easily escape and go scot-free; and in the non-admissibility in many instances of witnesses, thoroughly familiar with the facts, on the ground of self-interest—that antiquated theory that once prevailed in England and the United States, but which has long since been discarded as unsuitable to the proper administration of justice.

It is difficult, if not impossible, for a person, educated under the principles of Anglo-Saxon law, to become imbued with those of the civil law where exclusively used and the procedure thereunder. The two systems are diametrically opposed, and their very basis and foundation are antagonistic. Under Anglo-Saxon law everyone is assumed to be honest—everyone is presumed to be innocent until proven guilty—and a man's unwritten word is as good as his bond. Under the civil law, however, everyone is regarded with suspicion, and self-interest is accepted as a sufficient reason to discredit everything he does or says—in other words, he is presumed to prevaricate, and Judges possess the right, even in the absence of any positive rule or legislation on the subject, of excluding the testimony of any witness on the ground that, in their opinion, the testimony is not sincere owing to the witnesses' interest in the litigation. This may appear like a very broad and unjust statement, but it is not so; it is justified by daily experience.

That people are assumed to be dishonest instead of honest is illustrated in many little ways. For instance, a party to a suit and his household domestics and employees are presumed to be so incapable of telling the truth that they are precluded from testifying with the single exception of a divorce suit. In other words, a party and those living in his house and serving him are discredited—they are not believed to be sincere in what they say. And should you

meet with an automobile accident, neither your testimony nor that of your chauffeur would be received as conclusive on the ground of self-interest; you would have to look about for some by-stander or pick up some witness in the street if you hope to prove your case in a Court of justice. It is for this reason that one constantly sees after an accident those concerned standing idly about waiting for the appearance of a sergent de ville because his report or *procès verbal* is official and legal evidence; he jots down the facts as he finds them, and the names of witnesses, and in this way the circumstances are preserved for future use. Where certificates are given servants on leaving, these although signed by the employer, are regarded as worthless unless the signature is duly attested by the commissaire de police of the quarter where the employer resides, the mere unverified signature having no probative value.

There are no officers for the administration of oaths, such as Commissioners for oaths or Notaries Public, nor are oaths required, ordinary pleadings and petitions not being sworn to; and the usual affidavit, so familiar in Anglo-Saxon practice, is unknown, except where introduced in a case by international lawyers. In an ordinary civil case none of the evidence is verified, nor are there any restrictions or limitations as to what may be introduced as evidence, everything being admissible even to newspaper cuttings and unverified telegrams. Everything goes in, but then comes the cleverness and adroitness of the French avocat, who is a master in the art of sifting and analysing papers, letters, and documents, so that in the end only such as have a real and legitimate bearing on the issue are taken into consideration by the Court. Nothing surprises a stranger more than to be told it is only on the rarest occasion that witnesses are heard in a civil case, and then only when an *enquête* is ordered—that is to say, an examination orally of witnesses before a Judge alone, as happens frequently in divorce cases; or before a master or referee (*arbitre*), or an appraiser or valuer (*expert*), who is appointed to investigate and report as to the injury done or the value or quality of work, or the condition of property, such, for example, as an automobile. But in no instance does the avocat personally interrogate a witness. At an *enquête* the avocat or avoué remains present like a disinterested spectator, while the Judge interrogates the witnesses, and

takes down their testimony in narrative form. He may, however, request the Judge to put some additional questions to the witness, but he cannot insist on this. In civil cases the evidence is not recorded in the form of questions and answers. There is nothing like those wearisome objections to the admission of evidence, on the ground that it is incompetent, irrelevant and immaterial, that constantly encumber a trial in the United States, and as jury trials do not exist in civil cases, except in cases of eminent domain, all those dilatory and artificial requests to charge, and objections to the Judge's charge, that so often end in the failure of a litigation aside from the merits involved, are unknown in France. In this respect the French system is vastly superior to the practice before American tribunals, where a large percentage of cases are lost or won, not on their merits, but because of some error in practice or procedure committed by the counsel engaged or by the Court itself. In such case the client suffers, but he is left without remedy or redress. The absurdity to which these technicalities are carried in America has reduced the practice of the law to a black art, in which the interests of clients are daily sacrificed, through mistakes of commission or omission, in an attempt to live up to the numberless artificial rules that have gradually attached themselves to the practice of the law and become an incubus. Happily, nothing of this kind exists in France, where a better sense of justice prevails; that is to say, where the law is regarded as a means for the quick and just settlement of disputes according to their merits, and where, if a man has a good case, he does not run ninety chances in one hundred of being beaten through some trifling indiscretion or officiousness of his *avocat* in the examination of witnesses, or by reason of the Judge putting the case to the jury in an inartificial and inartistic way. In France cases get down to their real basis, and the truth is sure to come out, instead of being smothered under collateral questions that have nothing whatever to do with the matters at issue.

One of the reasons that enables French procedure to dispense with oaths and bonds is that the fabric of the French system is constructed under the constant surveillance of administrative and judicial officers, all of whom are educated and admitted into their several orders after most careful examination as to their moral and financial

standing, and who are individually and pecuniarily responsible for their acts, not only to their clients, but likewise to their orders, the heads of which exercise a strict and immediate control over their actions. In this way a degree of dignity and responsibility is attained that does away with the necessity of oaths and bonds for lawyers, and ministerial officers are placed on their probity and honour to that extent that every pleading and all process is not only presumed to be correct, but has the personal cachet of the individual from whom they emanate, and for whose slightest dereliction the most serious consequences are sure to follow. No one ever questions the act of an *avoué*, a *notaire*, a *huissier*, or an *avocat*, because their acts are those of public officials whose slightest omission or neglect makes them immediately amenable to discipline or disgrace, or even expulsion from their order or chamber. In this way the highest tone of moral and professional etiquette is preserved. It is this close watchfulness—this constant vigilance of the governing bodies of the various judicial and administrative officers that gives to the French judicial system much of its recognised and unquestioned high standing.

The Ministère Public is represented by an official or magistrate before every Court in France, except the Tribunal de Commerce, Conseil des Prudhommes, and Justices of the Peace. Before the Cour de Cassation there is a Procureur Général and six Avocats Généraux. In the Cour d'Appel there is a Procureur Général, one or more Avocats Généraux, and a number of substitutes, while the Tribunaux de Première Instance have a Procureur de la République and usually one or more substitutes. Their functions consist in watching, requiring, and insisting in the name of the Government on the execution of the laws, decrees, and judgments, and, by virtue of their office, to follow and prosecute all matters concerning public order, the public domain, the rights of the State, and of those persons who are incapable of defending themselves: and to intervene as a party principal in a large number of instances where specially authorised by law to do so. They take part in every civil case and orally present their views to the Court, joining in the conclusions submitted by the *avocat* whose side they espouse. In such case they examine the pleadings and evidence, but take no part in the procedure, nor can they submit to the Court any conclusions

other than those represented by one of the parties. These magistrates form an important feature of the Courts, and their views and support have naturally much weight with the Judges, so that not only has an *avocat* in a civil case to convince the Court of the merits and justice of his case, but he has also to obtain the favourable opinion of the *Ministère Public* in order to have the force and benefit of his co-operation. These officials, it will be seen, in their combined and various duties embody the duties of an attorney-general and district attorney or public prosecuting officer.

The doctrine so well known in Anglo-Saxon jurisprudence—*stare decisis*—is unknown to French law. It means to adhere to decided cases—it is the doctrine of precedent. A precedent is a judicial decision which serves as a rule for future determination in similar or analogous cases, but in French jurisprudence Courts do not refer to other cases—precedents are rarely cited by the Court, this being left entirely to the *avocat*. One of the results of this system is that on almost any question there have arisen a multitude of theories, or what are called systems, each backed by numerous decided cases or the books of well-known text-writers on law, so that one is never quite sure what particular system the Court may apply to the facts of a given case. One would imagine that the adoption of the doctrine of *stare decisis*—the following of cases adjudged by the higher Courts—would be essential to the stability and uniformity of the proper administration of justice, but this does not appear to be so. The practice has its advantages in the independence of the Courts to render their judgments untrammelled by any motive except to apply some general principle to the facts as they may be presented, and in the practical administration of the law in France equity and right in the end prevail. Under Anglo-Saxon jurisprudence. Courts are reluctant to interfere with the rules laid down by a Court of last resort, and will uphold them even though they would, except for such precedent, decide differently; while under French jurisprudence, as precedents are scarcely ever quoted in judgments, Courts are free to follow, and usually do follow, their own inclinations, even though they may be contrary to some adjudicated case. For this reason there is no such thing as an opinion by the Court—Judges never express an opinion—the only document being a carefully-worded judgment that recites the facts and the

contentions of the parties, and then states the law applicable. Judgments are rendered by the majority of the Judges, but the personality and individuality of the Judges are never revealed, as their names do not appear, and for this reason one never hears of prevailing and dissenting opinions, a judgment being the judgment of the Court as such and not the judgment of any designated Judge.

The life of the French *avocat* is not passed in his office or *étude* in the same way that most English and American lawyers do, for, except among the few prominent leaders in large cities in England and the United States, most lawyers in London and New York are generally found at their offices. In France, however, and especially in Paris, this is not the case, as the entire Bar, consisting of *avocats* and *avoués*, go with the regularity of clockwork day after day to the Palais de Justice, where they remain until late in the afternoon, ordinarily getting back to their offices at five o'clock. Most of their time is consequently passed at the Palais. There they betake themselves daily, whether they have an engagement in Court or not, and, robed, mix in the multitude, so that, whether occupied or idle, the French *avocat* always appears animated and busy; he pleads from Court to Court; promenades the labyrinth of long corridors, or saunters through the vestiaire, or works in the library. The Palais is practically a club—a rallying place—where the brethren meet; where they plead and try cases, or, robed, stroll and chat and pass the time away. Taking the Paris Bar for example, there are about 3,000 *avocats* of the Cour d'Appel, an *avocat* being the same as a barrister or counsellor-at-law. An *avocat* does not have an office, but receives and sees clients at his house, as well as *avoués* who entrust matters to them, an *avoué* being equivalent to a solicitor or attorney-at-law. An *avocat* never advertises, nor was it until last year professional etiquette to have professional cards or official letter paper. The standing and integrity of the Bar is maintained with severity. An *avocat*, having undertaken a case, cannot let it go by default even on the pretext that his fees are not paid; and while according to law he has the legal right to sue for and recover his fees, yet this is forbidden by many of the Bars, such as that of Paris, which prohibits an *avocat* suing for his compensation, punishing such an act as one of the most grave infractions of professional duty. Professional com-

pensation is regarded as voluntary, and it cannot be fixed at so much a month, or so much a case, or based on a share of the recovery, or conditional on success. The secret professional and personal honour and probity of the Bar is scrupulously guarded, and nowhere is the dignity and high standing of professional rectitude more thoroughly safeguarded than in France.

The different Bars are under the guidance and supervision of a council of the Order, who annually elect a *batonnier* or president, the *batonnier* of the order of *avocats* of Paris being the distinguished *avocat* Fernand Labori. Keen, energetic, brilliant, learned, and with unsurpassed eloquence, Maître Labori's reputation has long since become international; it is a pleasure to know him—an honour to be his friend.

A minor can practice before the Courts. There is nothing in the law prohibiting this, and, on the contrary, it can be implicitly inferred from the fact that students can be 16 years of age when they enter law schools, and that the course of study is three years, at the end of which they can be licensed, and on taking the oath they become *avocats*, and as such are entitled to wear the robe with the insignia of the order—the *chausse* or shoulder-knot on the left shoulder. These, however, are not so much the insignia of their profession as distinctive signs of their licensed grade. Once having taken the oath of *avocat*, the individual has the right to retain the appellation even though he has resigned or ceased to practice, as the title of *avocat* is distinct from the practice of law. He may still be an *avocat* although not an *avocat à la Cour*; here lies the distinction. French nationality is essential to the profession of an *avocat*, but this does not mean citizenship; for one can be of French nationality without being a French citizen. *Avocats* of the *Cour d'Appel* plead before all jurisdictions except before the *Cour des Comptes*, the *Conseil d'Etat*, the *Tribunal des Conflits*, and the *Cour de Cassation*, although they can by special authorisation be permitted to plead before the Criminal Chamber of the latter Court.

The *avocats* of the *Cour de Cassation* are a select body numbering about sixty. They alone possess the double quality of attorney and counsellor-at-law in so far that they perform the double functions of *avoué* and *avocat*. All documents in the procedure in those high Courts

wherein they practice are signed by *avocats* of the *Cour de Cassation*.

An *avoué* is practically an attorney of record. He drafts and serves the legal documents and pleadings in a cause, petitions, decrees, orders and judgments; besides these he performs other functions, such, for instance, as the sale of property by auction. The Chamber of *Avoués* is a close corporation, and vacancies by death, resignation, or other cause are filled by an order of the President of the Republic after certain formalities and with the consent of the Chamber; and an *avoué's* étude or business has a readily estimated marketable value, the same as that of a *notaire*. Every litigant must be represented by an *avoué*, although *avoués* have not the right to plead, except before Courts where there are less than five *avocats* affiliated. An *avoué* can only practice before the Tribunal to which he is associated, so that there are *avoués* at the *Cour d'Appel* as well as those of the Tribunal Civil.

While parties to a suit, assisted by their *avoués*, may personally plead their own cause without the assistance of an *avocat*, yet the Tribunal has power to withdraw this privilege if it sees that passion or inexperience prevents a litigant presenting his case with ordinary propriety, or with that clearness necessary for the instruction of the Judges. A party to a suit may therefore dispense with the services of an *avocat*, but he cannot do without those of an *avoué*.

The *Cour de Cassation* is the highest Court in France. It is the Court of final resort. Its existence dates back to 1790, when it first appeared at the Tribunal de Cassation, for, owing to the then prevailing revolutionary spirit, it was regarded unwise to use the word Court, all Courts then being designated as Tribunaux. Kings and Courts were considered terms irreconcilable with the spirit of Republicanism. The *Cour de Cassation* is composed of three chambers, the *Chambre des Requêtes*, the *Chambre Civile*, and the *Chambre Criminelle*. Cases are brought before the *Cour de Cassation* by what is known as a *pourvoi*, which is a written recital of the legal grounds why the judgment below should be reversed; and in civil matters this *pourvoi* is first presented to the *Chambre des Requêtes* of the *Cour de Cassation*. If the *Chambre des Requêtes* concludes that the grounds of appeal are unfounded, the

pourvoi is rejected in a judgment giving the reasons therefor, and that finally disposes of the appeal. If it comes to the conclusion that they are well taken, the pourvoi is then submitted by a simple decision, without reviewing the merits, to the *Chambre Civile*, which is alone authorised to give final judgment. It is apparent, therefore, that judgments by the *Chambre Civile* have much greater authority and a higher judicial value than those rendered by the *Chambre des Requêtes*, because, before the *Chambre Civile* can hear an appeal in a civil case, it must necessarily have been previously heard by the *Chambre des Requêtes*, in which case the two different chambers of the *Cour de Cassation* pass upon the appeal. In criminal matters there is only one chamber. Where the *Cour de Cassation* has reversed a judgment, and on a new trial the Court below still adheres to the first judgment, and another appeal is taken to the *Cour de Cassation*, the Court in such case sits with its several chambers united as a Grand Court, composed of 34 conseillers. The *Cour de Cassation* with toutes chambres réunies is the most solemn tribunal in France, and one of the most distinguished to be seen anywhere, and when its judgment is pronounced it is conclusive on the Courts below. When an appeal has succeeded before the *Cour de Cassation* and a new trial is ordered, the case is sent before a Court other than that which originally heard it; it is never referred to the same Court. The *Cour de Cassation* only reviews questions of law, so that many appeals are rejected as they involve only questions of fact, in the determination of which the *Cour d'Appel* is sovereign. In election cases, or cases involving the right to vote, the law allows a direct appeal from a judgment of a justice of the peace to the *Cour de Cassation*, without the expense and delay of intermediate appeals. The first President of the *Cour de Cassation* receives 30,000 francs a year, and the Presidents of the different chambers 25,000 francs. The salary of a counsellor or associate Judge is 18,000 francs a year. There is another feature of the *Cour de Cassation* quite apart from its strictly judicial character. The *Cour de Cassation* constitutes the Superior Council of the Magistrature, and when all the chambers are united in solemn conclave it exercises full disciplinary powers over all Judges of all Courts, from the highest to the lowest. Its action, however, can only be invoked by the Keeper of the Seals, and

then its judgment can only be rendered after the magistrate has appeared and been heard, or has been regularly summoned to appear.

One of the most important Courts in France is the Conseil d'Etat or Council of State. It is one of the old and historical *tribunaux* of France. It might well be termed an administrative Court. It is composed of thirty-two Councillors of State in ordinary service; eighteen Councillors of State in extraordinary service; thirty Masters of Requests (*Maîtres des Requêtes*), and thirty-six Auditors. Councillors of State in ordinary service are elected by the National Assembly, while those in extraordinary service, Masters of Requests, the Vice-President, and the Secretaries, are appointed by the President of the Republic. The Minister of Justice is the presiding officer. The Council of State, besides being an advisory or consultative body in relation to all administrative subjects and decrees, is largely judicial, and finally passes on controversial questions and disputes arising in the administrative departments, or involving the power of jurisdiction of an administrative officer; and it is also the tribunal having exclusive jurisdiction under the law of eminent domain, and in all proceedings relating to the acquiring of private property for public use, in which instance—a remarkable exception in French jurisprudence—a trial by jury is permitted.

For the expedition of business the Council of State is divided into five sections, that is to say:—1. Contests; 2. Legislation, justice and foreign affairs; 3. Interior, worship, public institution, and beaux-arts; 4. Finance, posts and telegraph, war, navy and colonies; 5. Public works, agriculture and commerce.

The Vice-President of the Council of State receives 25,000 francs a year; the Presidents of Sections, 18,000 francs; Councillors, 16,000 francs; *Maîtres des Requêtes*, 8,000 francs, and Auditors, 2,000 francs. The Council of State in general assembly cannot deliberate unless sixteen members are present. The section of contests is charged with the preparation of the evidence, and report on the disputed matters brought before the Council of State. This report is made to the Council of State in public session, which is composed of the members of the section together with eight Councillors in ordinary service, two being chosen from each of the other sections. A *Maître des Requêtes*

represents the Ministère Public, and fulfils duties similar to those of the Procureur de la République in other Courts. After the report on the matter in dispute has been read, the *avocats* of the parties interested are heard orally, and the Master of Requests gives his conclusions.

Only matters wherein an *avocat* has appeared, or when one of the Councillors of State or Masters of Requests has requested it, are heard before the Assembly Public, a public audience convened as a Council of contests.

It is only when one considers the vast number of administrative offices, the numerous questions of election constantly arising, and the complex matters connected with taxation, the customs, and the *octroi*, that the importance of the Council of State becomes evident.

Here, for example, are two matters that give an idea of some of the cases that come before the Council of State. An officer in charge of the laboratory of research, connected with *l'aérostation militaire*, resigned. Some two years later he was confronted with a decree of the Minister of War, holding him responsible for the loss of several thousand francs worth of property alleged to be missing, but no inventory was made when he left the laboratory, nor did he have notice of the proceedings that led to his condemnation. The Council of State promptly quashed the proceedings and decree of the Minister of War with costs. In another case, decided in December, 1910, an individual had taken sand, between low and high tide, on the shore of the Mediterranean, contrary to an ordinance of August 6, 1681—an ordinance over 230 years old. He was fined by the Conseil de Préfecture, and on appeal taken to the Council of State, the judgment was affirmed.

The French judicial system provides a special tribunal for disposing of conflicts involving the competency of the judicial and administrative departments and their officials, known as the Tribunal des Conflits. It is composed of the Garde des Sceaux (Keeper of the Seals) as president; three Councillors of State, elected every three years; three Judges of the Cour de Cassation, named by their colleagues, and two Councillors of State elected by the other Judges of the Council of State. The matters that come before this tribunal are complex, and the procedure and rules governing this tribunal are too intricate to consider at length, but the

following is an example of a case that came recently before the Court.

The mayor of a commune caused the overhanging branches fringing a parish road to be cut, whereupon the proprietor sued him before the Civil Court and recovered damages. The mayor took the ground that he was a public official carrying out a public work, and that the Civil Court was therefore incompetent—that there was a conflict between the administrative and judicial departments—and the Civil Court took this view and entered an order to this effect. The case thereupon came before the Tribunal des Conflits, which held, that as the mayor had not observed the law, requiring in such cases a preliminary *constate*, and notice to the proprietor to do the necessary lopping himself, and as such work did not constitute a public work, the civil tribunal was competent.

The Cour des Comptes, contrary to general impression, is not only an administrative Court for the supervision and control of official accounts and expenditures, but possesses likewise strictly judicial functions. It is composed of eighty-six counsellors referendary appointed for life. By law this Court stands next in rank to the Cour de Cassation. It is presided over by a first president, and is divided into three chambers, each with its own president. It has its own attorney-general. When necessary, the three chambers meet, forming a *Chambre de Conseil*. Where in the examination of accounts, forgery, embezzlement, or speculation is discovered, the fact is reported to the Minister of Finance and referred to the Minister of Justice, who prosecutes the offenders before the ordinary tribunal. An appeal lies in certain cases to the Council of State.

The Cour d'Appel is the intermediate Court between the Tribunal de Première Instance and the Cour de Cassation. Including Algiers there are 27 Cours d'Appel in France, comprising 63 chambers, 27 first presidents, 63 presidents of chambers, and 451 counsellors or associate Judges. The Cour d'Appel of Paris consists of nine chambers. The Cour d'Appel is not a Court of original jurisdiction, although an appeal is practically a new trial when the case can be presented *de novo*, either party having the right to introduce new or additional evidence. Judgments must be rendered by at least five Judges, except in appeals heard in *audiences solennelles*, or solemn audience, when not less than

nine Judges must participate. Solemn audience is where two or more chambers are united, the law providing that certain questions must be heard before such a composite Court, as, for instance, where a case has been sent back by the Cour de Cassation; or where it relates to the State or to the civil status of citizens. This, however, only applies to civil cases. The first president of the Cour d'Appel of Paris receives 25,000 francs a year, while in other departments his salary is 18,000 francs; the presidents of the different chambers in Paris get 13,750 francs, and outside of Paris 10,000 francs; while the counsellors or associate Judges in Paris receive 11,000 francs, and in other Cours d'Appel they have 7,000 francs a year.

The Tribunal Civil, or Tribunal de Première Instance, as it is called, is the general Court of original jurisdiction, there being one for every department, and in cities they comprise several chambers, the Court in Paris being composed of 11 chambers. This Court includes 438 chambers composed of 384 presidents or presiding Judges; 667 Judges, and 806 assistant Judges, or a total of 1,857 Judges. Judgments must be rendered by at least three Judges. And this fact brings out one of the great distinctive features of the French judicial system, which is that no civil case outside the Court of a Justice of the Peace is decided by a single Judge, every Court being composite in character, and no judgment can be rendered except by at least three Judges. There is no appeal in cases involving less than 1,500 francs unless the question of the Court's competency is involved.

The Conseils de Préfecture also exercise judicial functions. There is one in each department. In the department of the Seine (Paris) it consists of nine councillors; in thirty other departments of four, and in other departments of three. They are appointed by the President of the Republic. In the department of the Seine the préfet receives 50,000 francs a year, and counsellors 10,000 francs; in préfectures of the first class préfets receive 35,000 francs, and councillors 4,000; in préfectures of the second class préfets receive 24,000 francs, and councillors 3,000 francs; and in préfectures of the third class préfets receive 18,000 francs, and councillors 2,000 francs.

The Conseils de Préfecture are presided over by the préfet. A conseiller de préfecture must be 25 years of age; he must be a licentiate in law, or have during at

least ten years performed compensated duties in the administrative or judicial departments, or have been for the same period a member of a *conseil général* or mayoralty. Their duties are incompatible with other public employment or the exercise of a profession. The meeting of the Conseil for the consideration of contested matters are public. After hearing the report on the matter at issue, made by one of the counsellors, the parties are permitted to be heard either in person or by their representative. The deliberation is in secret but the decision is made public. An appeal lies in all contested matters to the Conseil d'Etat; and by law certain articles of the Code of Procedure relating to procedure are made applicable to the Conseils de Préfecture. An affair that recently came before the French Courts affords an example of the judicial functions of the Conseil de Préfecture. One of the public thoroughfares of Paris had long been in a state of upheaval, caused by a railway laying its electric cables. One evening a woman fell into an excavation on the sidewalk and broke her leg. She sued the railway company before the civil Court, which pronounced itself competent, but on appeal this judgment was reversed, the Cour d'Appel holding that the civil Courts were not competent, and consequently sent the matter before the Conseil de Préfecture.

The Tribunal de Commerce is the great commercial Court, the Judges of which, like the officials of the Conseil des Prudhommes, being the only elected judicial officers in the Republic. The Court is not founded on a strictly legal basis—that is, the Judges are not lawyers trained in the profession—but industrial, commercial, and business men. It is a speedy and practical tribunal for the determination of business and commercial disputes, and consequently has become one of the most influential and potent tribunals in France. It can well be described as the people's Court, composed of and by the people, and presided over by Judges of their own choice. All the members of the Tribunal de Commerce, including the president, Judges, and assistant Judges, are elected directly by a body of electors, and must receive a majority at least equal to a quarter of the registered voters. The Judges must be 30 years of age, and have been engaged in French commerce in the *arrondissement*, where they reside, for at least five years. The president is elected from those who have

performed the duties of Judge for two years, and the Judges are chosen from those who have served as assistant Judges, the term of all Judges being two years.

One of the most interesting tribunals in France is the Conseil des Prudhommes. It is, perhaps, the most artfully devised and democratic Court in the world, for the reason, that besides being composed of elected officials, it is so constituted as to avoid the possibility of a dispute being judged except by a representative body composed of an equal number of partisans affiliated in position and occupation with each of the parties. It is the Court of the factory and the workshop—of the contractor, the builder, the workman, the artisan, the mechanic, the merchant, the tradesman, and the clerk. The toilers, by day and by night, and their masters, come face to face before this simple tribunal and receive equal treatment, according to their own ideas of justice, which, although they may at times appear crude, are, however, tempered with as much equity and impartiality as elsewhere.

The Conseil des Prudhommes is a tribunal having jurisdiction over questions of wages and employment arising in commerce and industry, between patrons or their representatives, and employees, workmen, and apprentices of either sex. Its main purpose is to afford the patron and working man a speedy and inexpensive means of adjusting their difference in conciliation, and in the event of failure, by an immediate judgment. The tribunal comprises a Bureau de Conciliation and a Bureau de Jugement. The Bureau de Conciliation is composed of a workman, an employee, and a patron, the foundation and theory on which the tribunal is established resting on the mixed composition of the councillors, so that absolute impartiality shall prevail, and equality of justice be assured between the parties. The Bureau de Conciliation is presided over by one of the three members, who is chosen alternately from the patrons, employees, or workmen. Its sessions must be held at least once a week, and they are not open to the public. The Bureau de Jugement, as it is called, always consists of an equal number of patrons and of employees or workmen; never less than two patrons and two employees or workmen, one of whom is the president or vice-president of the Conseil des Prudhommes, who preside alternately. Judgment is rendered by the majority of those

present, and in case of an equal division—of their standing two to two—the affair is put over to be heard by the same tribunal at the earliest day possible, when the Justice of the Peace of the *arrondissement*, or *canton*, presides, thus making a tribunal composed of five individuals, and as the Justice of the peace is neither a patron, employee, or workman, in this way that perfect evenness and equality between the capitalist and the working man is maintained, which all the way through is the one predominating feature of this labour Court. The *Bureau de Jugement* is open to the public. There is only one *Conseil des Prudhommes* for each city, but the conseil can be divided into sections, each of which is autonomous. The Conseil's jurisdiction in matters between patron and employee is limited to 1,000 francs, but between patron and workman it is unlimited; and where the amount is under 300 francs no appeal lies. Appeals to the Civil Tribunal must be disposed of by that Court within three months from notice of appeal. The procedure before the *Conseil des Prudhommes* is simple, quick and inexpensive. It is in truth the poor man's Court. The notice for conciliation is by simple letter. The notice to appear before the *Bureau de Jugement* is by registered letter, or by notice served by a marshal; and in both cases one clear day must intervene between the day of service and the hearing. In cases of 20 francs and under, the usual recording and registration fees are not required.

The last, but by no means the most insignificant Court of the French judicial system, is that of the *Justice de Paix*, or Court of the Justice of the Peace. There is a Judge de Paix for every *canton*, and in cities one for each *arrondissement*. They have jurisdiction ordinarily up to 600 francs, and in exceptional cases up to 1,500 francs. The authority of these inferior Courts becomes apparent when it is realized that no appeal lies from their judgment in matters involving less than 300 francs, and that they often decide questions of equity in which their determinations are final. This conclusive character of the judgment of the Judge de Paix in the great majority of cases, gives to them an importance and infallibility not enjoyed by superior tribunals—they know that most of their decisions cannot be reversed.

V.—THE FRENCH JUDICIAL SYSTEM.

PART II.—CRIMINAL.

The criminal Courts in France are the Tribunal de Simple Police, Tribunal Correctionnel, Cour d'Assises, Cour de Cassation and Haute Cour de Justice. The Tribunal de Simple Police has jurisdiction over petty offences not involving over fifteen francs fine or five days' imprisonment. The Tribunal Correctionnel is the chamber of the Tribunal de Première Instance set aside and exclusively devoted to the hearing of misdemeanours and appeals from the Tribunal de Simple Police, its original jurisdiction involving offences punishable by over fifteen francs fine and over five days' imprisonment. The Cour d'Assises has jurisdiction over crimes triable by a jury—felonies—where the prisoner has been indicted. The Criminal Chamber of the Cour de Cassation is an appellate tribunal. Finally there is the Haute Cour de Justice, or High Court of Justice, which is a rare and exceptional tribunal of criminal jurisdiction. It is composed of the Senate convened by decree of the President of the Republic as a High Court of Justice. The President selects a magistrate from the members of the Cour de Cassation or Cour d'Appel, who is charged with the duties of an Attorney-General before the Court, and one or more magistrates to assist him. It is an instance of a legislative body being transformed into a judicial body, and in some respects it resembles a Court of impeachment, as it is empowered to try the President of the Republic and the Ministers for crimes committed in the exercise of their functions. But its jurisdiction is not limited in this respect, as the Senate, on being convened as a High Court of Justice by decree, is empowered to try those accused of attempts against the safety of the State, which is practically high treason. Ordinarily these offences, especially when they do not assume an important political character, are disposed of by the ordinary tribunals, the Senate only being convened as a High Court of Justice under extraordinary circumstances; as, for instance, when it tried General Boulanger.

One of the fundamental distinctions in French criminal procedure is the separation between the preliminary investigation and proof of an offence and its prosecution. The first

is a matter that rests almost entirely with the *Juge d'Instruction*, who is in no way a prosecuting officer, and who possesses no authority to do more than to collect, obtain and prepare in judicial form the evidence of a crime. Once the evidence has been completed, the prosecution of the accused rests entirely with the administrative part of the Government, that is to say, the public prosecutor, or *procureur de la république*. While keeping this distinction in mind, it is refreshing to see with what ease and facility these two officials, following distinct and separate lines of work, yet labour in entire accord and sympathy. The *Juge d'Instruction* is absolute master in the preparation of the evidence and documents relating to the affair, in the same way that the public prosecutor—once the matter has passed into his hands—assumes sole and absolute control thereof.

What is known as the judicial police (*police judiciaire*) forms an important feature of the French Criminal Judicial System. The authority of some of these officers resembles in many respects that of ordinary police or committing magistrates, and yet they possess far greater power and independence in so far as the securing of evidence, the reconstitution of a crime, the preparation of the case, and the prosecution of the charge against the accused is concerned. The judicial police include the *commissaires de police*, officers of *gendarmérie*, mayors and their deputies, prosecuting officers, justices of the peace and *Juges d'Instruction*. The latter form by far the most important of these officials. On the shoulders of the *Juge d'Instruction* is really thrown the brunt and labour of the administration of the criminal law. His functions and duty are unique. There is at least one for every *arrondissement* appointed for three years by the President of the Republic from among those holding the title of Judge or from among the assistant or deputy Judges. On the commission of a crime the *Juge d'Instruction*, either on his own initiative or on that of the prosecuting officer, hastens to the scene and makes a personal examination, using all the ability and astuteness of a skilled detective in bringing to light the details of the affair; and in this way some of the *Juges d'Instruction* have become famous owing to their cleverness and adroitness in bringing to justice those guilty of the most abominable but apparently unfathomable crimes. The *Juge d'Instruction* works, however, in strict harmony with the public prosecutor, who usually accompanies him in constating a crime; and

among his arbitrary powers is the right to go to the habitation or office of the accused (or elsewhere if necessary) and seize any papers, books or documents, or other evidence material to the charge against him and place them under seals and remove them. When an accused is brought before a Juge d'Instruction the latter becomes for all intents and purposes a committing magistrate. He proceeds from time to time with the examination of the accused and other witnesses whose evidence is reduced to writing; he has power in certain cases to admit to bail, and when his investigation is complete he either discharges the accused or sends him for trial before the tribunal having cognizance of the offence.

One of the most singular yet effective features of the French Criminal Judicial System is what is known as the "partie civile." A claim for compensation caused by a felony, misdemeanour or simple police offence, can be heard and determined at the same time by the same tribunal and by the same procedure as the criminal charge. The person injured constitutes himself what is known as "partie civile," and has the right of being heard and represented by counsel, and awarded damages without the delay and expense of resorting to an independent separate action. The civil remedy, although connected with, is in no way dependent upon the criminal proceeding; the two can be prosecuted together but need not be, as this is optional with the person injured or *partie civile*.

French criminal law is divided into:—

- (A) Contraventions or police offences.
- (B) Délits or misdemeanours.
- (C) Crimes or felonies.

We will consider these in their consecutive order.

(A) Contraventions or police offences are punishable by imprisonment for not less than one day or more than five, and a fine of from one to fifteen francs, and the confiscation of the objects or material seized.

(C) Délits or misdemeanours are punishable by imprisonment for not less than six days nor more than five years, and where specially authorized by law, the Court may deprive the offender from exercising civic, civil, or family rights; from voting or being eligible to election; from serving as a juror or other public function; from carrying arms; from participating in the family conseil and various other privileges; by a fine and, where a party has joined in the proceedings as a *partie civile*, by restitution or damages.

(c) The penalty for crimes or felonies is corporal and degrading punishment, or only degrading punishment. Corporal and degrading punishments are death; penal servitude for life or years; deportation; imprisonment with hard labour, and loss of civil rights and imprisonment.

The death penalty (excepting military crimes) is carried out by decapitation, executions by means of the guillotine having officially existed since the decree of March 20th, 1792.

All offenders triable by a jury must be sent before the assizes on an *acte d'accusation* or written charge, which is drawn up by the public prosecutor, and must contain the nature of the offence which forms the basis of the charge, and facts and any circumstances which may add to or reduce the penalty. The accused must be named and clearly identified. The *acte d'accusation*, or written charge, takes the place of an indictment in Anglo-Saxon criminal jurisprudence, and it only follows an *arrêt de renvoi* or judgment sending the offender before a Court for trial, which order is pronounced by what is known as *la Chambre des mise en accusation*, or chamber of accusation. This chamber is composed of a section of the Cour d'Appel specially formed for this purpose, which convenes on the order of its president at the request of the public prosecutor whenever necessary to hear the report of that magistrate and pass upon his application; and in the absence of a request by the public prosecutor the chamber meets once a week. The chamber passes upon the case immediately after hearing the report of the public prosecutor; if this is impossible, then it must render its decision not later than within three days. The Judges composing the chamber ascertain whether there exists against the accused the proof of the indications of a fact designated as a crime by law, and if these proofs or indications are sufficiently serious to justify the pronouncing of an act of accusation. The clerk reads to the Judge in the presence of the public prosecutor all the documents in the case, after which they are left on the table, together with any memorandum the *partie civile* or the accused may have furnished; but neither the *partie civile*, the accused, nor witnesses are present. The public prosecutor having deposited his application in writing, and signed by him, on the table, he and the clerk withdraw. Then the Judges at once deliberate among themselves, and without communicating with anybody the Court, by one and the same judgment, passes on the various connected offences (*délits connexes*) which they find among

the documents produced before them. And here we come to one of the most interesting, and at the same time to the stranger the most bewildering feature of the French Criminal Judicial System, as was so well brought out on the recent trial of the automobile bandits.

Offences are connected either when they have been committed at the same time by several persons together, or when they have been committed by different persons or at different times and places, but pursuant to an understanding formed beforehand among them, either when those guilty have committed one in order to procure the means with which to commit the other, to facilitate it, to carry out its execution, or to assure its being unpunished. A striking illustration of this, as I have already mentioned, was the trial of the automobile bandits. In March last twenty accused were arraigned before the Cour d'Assises and a jury, several of whom were accused of murders punishable with death, but not of the same person or at the same place; some of whom were accused of crimes punishable by imprisonment for life; some for twenty years, and some for offences only punishable by imprisonment for ten years. Yet all the long list of offences were so connected and so inextricably woven together that they formed one continued narration of crime; and it is a credit to any system of criminal procedure that enables the final hearing and disposal of such a series of crimes at one and the same time. Every one of the prisoners had a fair and impartial trial, and each offence was carefully and separately decided, the evidence relating to the participation of each prisoner being distinctly limited to his case; and while to a stranger this intermixing of different and separate crimes—calling for various degrees of punishment—may appear to be an unfair and unequal measure of justice, it is not so. Four of the accused were found guilty of murder and condemned to death, while four were acquitted, the others being sentenced to various terms of imprisonment ranging from deportation for life to imprisonment for one year, and in no single instance was one of the accused deprived of any right to which a person accused of a crime under Anglo-Saxon methods of criminal procedure is entitled to.

A Cour d'Assises is held in each department to judge those whom the *Chambre des mise en accusation* has sent there. The Cour d'Assises is presided over by a councillor of the Cour d'Appel appointed for this purpose, who is president, and by

two other Judges taken either from among the councillors of the Court d'Appel, or from the presidents or councillors of the Tribunal de Première Instance of the place where the assize is held. These Courts are held in the principal town of the department every three months, and oftener if necessary. The president is charged to hear the accused at the time of his arrival in the Court House, to summon the jurors and to draw them by lot. In addition, he is charged to personally direct the jury in the exercise of their functions, to expose to them the affair they are to judge, reminding them of their duty, and to preside at all hearings and determine the order in which those entitled to speak shall be heard. The president is also invested with discretionary power in virtue of which he is enabled to do whatever he thinks necessary in order to discover the truth, the law charging him on his honour and conscience to employ all his efforts in favour of its manifestation. He is also empowered during the course of the trial to cause to be produced and hear any witness or other evidence which may be revealed on hearing the accused or the witnesses, and which may appear to him to shed any light on the facts in dispute. If the prisoner has not chosen a lawyer, the Court appoints one to defend him. He appears unmanacled and only accompanied by guards to see he does not escape. The president asks his name, Christian name, age, profession, residence, and the place of his birth, and then he cautions his lawyer that he must not say anything against his conscience or in disrespect of the laws, and that he must express himself with decency and moderation. The president rising and uncovered then addresses the jury thus: "You swear and promise before God and man to examine with the most scrupulous attention the charge that has been brought against X.; not to betray either the interests of the accused or those of society which accuses; not to communicate with anyone until after your verdict; hearken not to hate, neither to fear or affection; decide according to the charge and the means of defence, according to your conscience and your personal conviction, with that impartiality and firmness which becomes an upright and free man." Immediately afterwards he notifies the accused to be attentive to what he hears, and directs the clerk to read the order of the *Chambre des mise en accusation* sending the case to the Cour d'Assises as well as the indictment (*acte d'accusation*). After the public prosecutor has explained the charge, the list of witnesses is read by the clerk and the witnesses are required

to retire into an adjoining room, precautions being taken if necessary to prevent their conferring together about the charge or the accused before they testify. The witnesses are called consecutively, according to the order established by the public prosecutor, the president first administering an oath to speak without hate or fear, and to say all the truth and nothing but the truth. Then follows the most marked and radical feature of the French criminal judicial system—the interrogation of witnesses by the president. A witness cannot be interrupted, but when he has concluded his testimony, the accused or his lawyer can ask the president to put questions to him; and the president then asks the prisoner if he desires to reply to what the witness has said against him, whereupon he or his lawyer can say whatever may be useful to the defence, either against the witness or his testimony.

The following persons are prohibited from testifying: the father, mother, grandfather, grandmother, and all other ascendants of the accused or anyone of the accused present and undergoing trial; the son, daughter, grandson, granddaughter, and all other descendants; brothers and sisters, those related in the same degree by marriage (*des alliés aux mêmes degrés*); husband and wife, even after divorce; and informers who, by law, receive a public pecuniary reward. The jurors, the public prosecutor, and the Judges can take notes of whatever appears to them important, either in the depositions of witnesses or in the defence of the accused. In every criminal matter, even in the case of an old offender, the president, after having charged the jury regarding the questions raised by the indictment (*l'acte d'accusation*) and the debates, warns the jury that if a majority of them think that there exist attenuating circumstances in favour of one or more of the accused, although recognized to be guilty, they must make the following declaration: By the majority there are attenuating circumstances in favour of the accused. Then the president hands to the foreman of the jury the questions in writing they are to answer, together with all the documents and papers in the case, and having warned them that each vote must be by secret ballot, the jury retire to their room which they cannot leave until they have decided on their verdict. No one is allowed to go into their room without written permission of the president, and he himself cannot enter unless he is called by the foreman of the jury and is accompanied by the lawyer for the accused, the public prosecutor, and the

clerk; and the fact must be recorded in the official proceedings.

A jury is composed of twelve jurors. If the case is apt to continue for a long time or involves questions that will prolong the hearing, the Court may order at the time of the empanelling of the jury that one or two additional jurors be selected who act as jurors in reserve; and in the event of a juror becoming ill or otherwise incapacitated he is immediately supplanted by the extra or reserve juror who has participated in the proceedings and who is thus in every way qualified to act; and in this way mis-trials or the failure of justice never occurs by reason of the original jury being reduced.

Extraordinary means are taken to secure a fair trial so far as the jury are concerned, and to allow absolute independence in the casting of their ballots; in fact, the moment the jury retire into their room their conduct, deliberation and balloting are surrounded by every precaution calculated to insure perfect freedom of action and independence on the part of the individual juror.

The jury votes by written ballots and by separate and consecutive balloting at first on the principal fact, and if there is reason to do so then on the aggravating circumstances, on legitimate excuse, on the question of discretion, and finally on the question of extenuating circumstances, which the foreman puts to the jury whenever the culpability of the accused has first been determined. To this end each juror on being called by the foreman is handed an open ballot bearing the stamp of the Cour d'Assises and the words: "On my honour and my conscience my declaration is—" and the juror himself fills in the blank space or he asks another juror to do so for him, with the word "yes" or "no" on a table so arranged that no one else can see what is written on the ballot. Having filled in the ballot he folds it and hands it to the foreman who deposits it in an urn or box used expressly for this purpose. Immediately after each ballot the ballots are burnt in the presence of the jury. This system of successive balloting often throws a tremendous burden on a jury, and it is questionable whether under the circumstances an ordinary jury is sufficiently qualified either from experience or intelligence to properly pass upon the vast number of questions submitted to them. In a recent case—what the journals

called "les scandales de Nice"—where there was a general acquitment of all the accused, no less than 402 questions were submitted to the jury. All questions are determined by a majority vote and the verdict must say so although the number of votes cast for or against the accused must not be revealed. Having decided on their verdict the jury enter the Court room and take their seats, whereupon the president asks them what is the result of their deliberation. The foreman, rising, and placing his hand on his heart, says: "On my honour and my conscience before God and men, the verdict of the jury is—" The verdict is then signed by the foreman and handed to the president in the presence of the jury; and it is also signed by the president and clerk. If the Court is convinced that while observing the necessary legal formalities the jury have been mistaken on the merits, it can set aside the verdict and send the case to the following sessions. No one has the right to request that this be done, the Court having authority to act solely on its own initiative.

Deportation is essentially a political punishment, or rather a punishment for a political offence, and consists either in what is known as deportation, which means transportation and being restrained for life within a fortified enclosure, or simple deportation—exile to some place prescribed by law beyond the Republic. In either case the condemned must remain where deported to but where otherwise he is practically free.

Detention is also a punishment reserved especially for political offenders, and must be for not less than five or more than twenty years, the offender being confined in one of the fortresses within the Republic determined by Presidential decree.

A curious survival of an ancient custom is still found in the Penal Code—strangely enough article 13—by which a parricide condemned to death is conducted to the place of execution in his shirt-sleeves, bare-footed, and with his head covered with a black veil. Thus attired, he is exposed to the public on the scaffold, while the sheriff reads the sentence, and then immediately executed.

Those condemned to penal servitude are sent to some penal settlements, such, for example, as Guyane or New Caledonia, the old offenders, and confirmed criminals being, as a rule, sent to the former. The prisoners are employed in the hardest labour, dragging at their feet an iron ball, or bound two-and-two by a chain when the nature of the work permits it. No

one 60 years of age can be sentenced to penal servitude, such sentence being replaced by imprisonment. Convicts condemned to penal servitude for less than eight years are bound after the expiration of their sentence to continue to reside in the colony for a period equal to that for which they are condemned, while those sentenced for more than eight years must pass the rest of their life there. After a convict has served his sentence he can, on the express authorization of the governor, temporarily leave the colony, but in no case is he allowed to return to France.

The Court can absolve the accused if the fact of which he is declared to be guilty is not forbidden by a penal statute. As already noted, the jury may find the accused excusable, but a felony or misdemeanour is only excusable in a case where and under such circumstances as the law declares it to be so. Thus blows, wounds, and even murder are excusable if provoked by blows or serious violence; and this applies where they occur in the day-time in repelling an individual climbing over or breaking into enclosures, walls or entrances to an inhabited house or apartment or out-buildings. If these occur during the night-time they are regarded as necessarily caused in self-defence, and while text-writers have contended otherwise, the Cour de Cassation has adopted the theory that murder even when accompanied by premeditation can be excusable. It is difficult to agree with this reasoning, or find a sufficiently logical basis on which to place two such inconsistent principles.

Parricide, however, is never excusable, and a murder by a husband of a wife or a wife of a husband is not excusable unless the life of the one who commits the murder is in peril at the moment when the crime is committed. This excellent proviso can well be appreciated, and is based on sound reasoning, and why it should only apply in matrimonial murders and not to others it is indeed difficult to understand. In the case of matrimonial murders there is an express provision of law providing that where a husband murders his wife (mark well that it is not in favour of the wife) or her accomplice at the moment they are surprised in the act of adultery in the matrimonial domicile (not elsewhere) it is excusable. But the most wonderful of all these legal excuses is that which provides that the crime of castration, if immediately provoked by a violent outrage against decency, is to be considered as excusable murder or wounding.

But excusable murder and crime does not mean that the guilty person is discharged or undergoes no punishment. When the fact constituting a legal excuse has been proven, if it relates to a crime punishable by death or penal servitude for life or deportation, the penalty is reduced to imprisonment for from one to five years; if it relates to another felony it is reduced to imprisonment from six months to two years, and if it relates to misdemeanour the penalty is reduced to imprisonment for from six days to six months.

The penal law relating to adultery shews the prevailing disposition to favour the husband and restrain the wife; it is a remnant of the old theory of the wife's vassalage and absorption on marriage in the personality of her husband. A wife can only be charged with adultery on the complaint of her husband, and if convicted is liable to from three months to two years' imprisonment; but the husband retains the right to stop the execution of the sentence by taking back his wife. The accomplice is liable to the same term of imprisonment, and in addition to a fine of from 100 to 2,000 francs; but the offence is exceedingly difficult to prove against the accomplice as the law restricts the only proof to evidence that the parties were caught *en flagrant délit* or to such as results from letters or other writing written by the accomplice. What constitutes *flagrant délit* has been the subject of exhaustive discussion. It does not mean that the parties must necessarily be caught in the act of adultery. *Flagrant délit* is ordinarily supposed to mean taken or caught in the commission of a crime, but with regard to adultery this is not so. *Flagrant délit* can be presumed, as when a married woman and her accomplice remain together in a locked room for some time and refuse to open the door.

There is not one law and one graduated scale of punishment for perjury, but the crime is shaded into many nice distinctions, and false testimony in favour or against a criminal is in the eyes of the law an entirely different offence from perjury in a civil suit. It is not easy to comprehend why perjury should be treated more considerably in one case than in another, or why the punishment, once the crime has been committed and proven, should be graded so as to virtually distinguish between the various kinds and degrees of false swearing. Public policy requires one firm, strong, and unvarying rule in such cases. Perjury, wherever and whenever committed, without distinction as to the place or surrounding

circumstances, should receive the same punishment. Criminal law, like the civil law, is getting to be too much of a metaphysical science, tending in its practical results to the evil-doer's escape from just and proper punishment. Under the French criminal system false swearing in a criminal trial, such as at the assizes either against or in favour of the accused, is punishable by reclusion, which means from five to ten years' imprisonment with hard labour, and where the accused is condemned to a more severe punishment the witness who has deposed falsely against him can be sentenced to the same punishment, while one guilty of giving false evidence in a civil case is punishable by imprisonment for from two to five years and a fine of from fifty to two thousand francs. Another thing requiring notice in connection with the offence of perjury is the ordinary Statute of Limitations. In France in commercial cases there is no absolute bar to a civil remedy simply by the lapse of time, but assuming the particular period of limitations has run and is pleaded, then in that case the adversary has the right to put the party setting up the statute on his oath, i.e., has the privilege of insisting that he swear the debt has been paid. Naturally, while a party may be only too ready to plead the Statute of Limitations, yet when it comes to making oath that the debt has been paid that is quite a different matter, and may well cause him to pause, especially when a false oath under such circumstances subjects the offender to imprisonment from at least one to five years; to a fine of from 100 to 3,000 francs, and in addition may deprive him of certain civic, civil, and family rights at least from ten to five years, during which period he may be placed under the surveillance of the police.

Perjury under the French law is a progressive crime not depending for its punishment on the offence itself, but upon its attendant circumstances and surroundings. The law should, however, look at the act of a perjurer as inimicable to and destructive to the morality, order, and well being of society, and stamp the conduct of those who give false testimony with its condemnation, accepting no excuse and refusing all mitigating circumstances. Without truth the fabric of all civilized authority will tumble in ruins, and social order become riot. Truth is the foundation of all religion; it is the groundwork of our schools and the basis of our education; it is the moral fibre of every great people; it is the guiding star to all success and progress; the one cardinal principle that, incul-

cated in the hearts and minds of a nation, will enable it to triumph over every adversity with courage and determination. Truth admits of no shading, no qualification, no degree. A thing is either true or it is false, and once let a deliberate false statement be proven, it merits but one condemnation and one punishment. In this particular the French Criminal Judicial System is wrong, because it is founded on a mistaken idea of a great fundamental principle. As there can be but one right and one wrong, so a thing can only be true or false, and he who seeks to take away or destroy life, liberty or property, by falsehood, should be punished for the crime itself—purely and simply for the wrong done—and irrespective of consequences of the perjured testimony.

A severe, and what might be considered harsh law is that against vagabondage or vagrancy. It may account for the absence to a large extent of the tramp class, for in France, once a vagabond falls into the clutches of the law it is likely to go very hard with him, for the Legislature has left very little discretion with those before whom an individual so unfortunate as to be charged as a vagabond may be brought. Vagabondage is a misdemeanour. Vagabonds and vagrants are those who have neither a fixed domicile or the means of support, and who do not regularly exercise any profession or occupation. Vagabonds and vagrants over sixteen years of age who have legally been declared such, are liable for this fact alone to from three to six months' imprisonment, and after having served their term, they remain under the surveillance of the police for a period of not less than five or more than ten years. An alien declared by a judgment to be a vagabond can be conducted to the frontier by order of the Government and put out of the country.

No account of the French Criminal Judicial System would be complete without referring to the semi-theatrical aspect it sometimes assumes, and which, from long custom and habit, it seems almost impossible to avoid. The reconstitution of a crime is an almost every-day occurrence, and yet, it is terribly dramatic and spectacular—it is re-enacting the tragedy with living persons—frequently with the dead body lying as originally found—and in the presence of and before the eyes of the alleged criminal. Sometimes it is too much for the nerves even of a hardened desperate murderer, and before this *mise en scene* of his crime he weakens, breaks down, and confesses. Courts have taken occasion, however,

not only to criticize, but even condemn, this time-honoured custom, and it is doubtful whether it will long survive modern and more liberal ideas of criminal procedure. Besides the reconstitution of a crime is the dramatic spectacle of confrontation, or bringing an accused person before his victim, or a witness, for the purpose of identification, and as this often occurs when one of the parties is *in extremis*, the scene becomes a theatrical and terrible ordeal.

An amusing as well as tragic scene, illustrating the natural theatrical tendency of those connected with the administration of criminal justice, occurred when the desperado Lacombe, momentarily escaping the vigilance of his warders, scrambled up a wall, and finally, perched like a bird on the ridge of the prison building in temporary security, not only defied all orders to descend, but hurled vile language and investive back at the officials gathered below in the prison yard. Such an escaped prisoner is no more than a wild beast, and under the circumstances, it would not only have been proper, but fitting, that he should have been shot down by the guard in the same way that any criminal seeking to escape should be shot. This, however, was the thing furthest from the mind of the officials who not only did not shoot him down, but on his demand, sent for his lawyer, and then calmly awaited his arrival. When he came the lawyer was assisted to approach his client, the criminal, on his perch on the roof, by means of a ladder, and permitted to have an interview with him. Imagine such an exhibition—what a theatrical picture for a drama. When this scene, which occupied an hour or two, had been played, and the avocat had descended from the ladder, his client proceeded to dash his brains out by plunging headlong into the stone courtyard below!

With all that is admirable in the French Judicial Criminal System there is that one great bulwark of personal liberty lacking that is essential to the liberty of the citizen—the writ of *habeas corpus*. In France this does not exist: in France there is no writ that secures the liberty of the individual from illegal restraint. With few exceptions, no matter how wrong and illegal his arrest may be, the accused when once taken into custody and confined in prison incurs the risk of awaiting the outcome of the investigation that the Juge d'Instruction makes into the charge, which may be a matter of days or weeks or months according to circumstances; and even if

discharged and entirely exonerated from the charge, the accused may have had to linger in a common prison for months without the possibility of seeking release. One sees on every hand the words: "Liberty, Equality, Fraternity," and France is called a Free Republic; but the history of the world has demonstrated that no country can be so called where the sacred writ of *habeas corpus* is unknown. In England and in the United States the writ of *habeas corpus* is now regarded as the greatest and most important remedy known to the law. From the assent of King John at Runnymede (June 15th, 1215) until the famous Habeas Corpus Act of 31 Charles II., c. 2 (1680), followed by the Statute 56 George III., c. 100 (1816), the life and existence of this right passed through many trying vicissitudes only eventually to be saved and secured to future generations by the statutes above referred to.

C. A. HERESHOFF BARTLETT.

A PROTEST AGAINST LAWS AUTHORIZING THE STERILIZATION OF CRIMINALS AND IMBECILES.

CHARLES A. BOSTON.*

Good and wholesome laws. Some one's idea of the public weal is the excuse for every abuse ever committed by power! For example: By the Act of 22 Henry VIII., ch. 9, passed in the year 1530, after reciting that

"The King's Royal Majesty calling to his most blessed remembrance that the making of good and wholesome laws and due execution of the same against the offenders thereof is the only cause that good obedience and order hath preserved in this realm."

*The author of this article was educated at Baltimore City College and Johns Hopkins University. He is now a member of the law firm of Hornblower, Miller & Potter, New York City; Vice-President for New York of the American Bar Association, Chairman of its Committee on Publicity; Vice-President Society of Medical Jurisprudence, and Chairman of its Committee on the Law of Insanity; Chairman, Committee on Judicial Statistics, New York State Bar Association; member Committee on Efficiency in the Administration of Justice of The National Economic League, etc., etc. Author of articles on Privileged Communications between Patient and Physician, and Laws Regulating the Practice of Medicine, and joint author of "Mental Unsoundness in its Legal Relations" in Witthaus and Becker's Medical Jurisprudence, Forensic Medicine and

It was enacted by authority of Parliament that Richard Rouse, otherwise called Richard Cook,
 "of his most wicked and damnable disposition, did cast a certain venom of poison into a vessel replenished with yeast or barm, standing in the kitchen of the reverend father of God, John, Bishop of Rochester, at his place in Lambeth Marsh; with which yeast or barm, and other things convenient, porridge or gruel was forthwith made for his family there being; whereby not only the number of seventeen persons of his said family did eat of that porridge, were mortally infected or poisoned, [but] one of them, that is to say, Bennet Curwan, gentleman, is thereof deceased, * * *

And therefore,
 "our said sovereign lord the king, of his blessed disposition inwardly abhorring all such abominable offences * * *

Ordained and enacted that the said Richard should stand and be attainted of high treason; and because the detestable offence required condign punishment, it was enacted that the said Richard Rouse should be *boiled to death*, (which was accordingly done¹), and that similar offenders in the future should be "committed to execution of death by boiling for the same."

The case of Richard Rouse, selected for illustration (and there may be hundreds of others chosen in which diabolical punishments were meted out, dictated by the same sentiment of supposedly good and wholesome laws), suggests now to the man reflecting upon it in the light of present day knowledge and intervening history, that both the King's Royal Majesty and his lords and commons in Parliament assembled, were ignorant of a scientific fact; that they knew nothing of the possibility of "ptomaine poisoning," and that Richard Rouse was or may have been unjustly condemned by ignorant Judges without a fair hearing, even though they were the King's Royal Majesty and the assembled political wisdom of England.

Toxicology. He has recently contributed articles upon the following subjects to legal periodicals: A Code of Legal Ethics (Green Bag, May, 1908); The Spirit Behind the Sherman Anti-Trust Law (Yale Law Review, March, 1912); Some Practical Remedies for Existing Defects in the Administration of Justice (University of Pennsylvania Law Review, November, 1912); Disbarment for Questioning the Integrity of the Court (Central Law Journal, April, 1913); Work of the Committee on Professional Ethics of the New York County Lawyers' Association (Bench and Bar, December, 1912).

¹ Froude's Henry viii, C. iv.

The Indiana Sterilization Law. The Legislature of Indiana, by C. 215 Laws 1907, approved by the Governor of that State, enacted that

"Whereas heredity plays a most important part in the transmission of crime, idiocy and imbecility."

Therefore every institution entrusted with the care of *confirmed criminals, idiots, rapists, and imbeciles*, should appoint two skilled surgeons, in conjunction with its chief physician, to examine the mental and physical condition of such inmates as may be recommended by the institutional physician and board of managers; and if in the *judgment of this committee* of experts and the board of managers, *procreation is inadvisable*, and there is no probability of improvement in the mental condition of the inmate, it shall be lawful for the surgeons to perform an operation for the prevention of procreation, but not unless the case shall have been pronounced unimprovable, *provided* that in no case shall the consultation fee be more than \$3.²

Thus, after nearly four centuries of human experience, political and scientific, since Richard Rouse was boiled to death under a "good and wholesome law," for an offence of which he may not have been guilty, and for which he was not tried, we find the legislative wisecracks of Indiana, declaring that two skilled surgeons and a chief physician, after forming a \$3 opinion, may, upon the recommendation of a board of lay managers sterilize a human being, if they think his case is beyond improvement and if he happens to be in their power, because forsooth,

"heredity plays a most important part in the transmission of crime, idiocy and imbecility."

That is to say, heredity is reduced by the Indiana Legislature to such exactitude that they know that if a "rapist" shows signs of improvement, his tendencies are not so far transmissible to his offspring as to make them a danger to the community; but if a board of managers, two surgeons, and a physician, conclude that there is no probability of improvement in the mental condition of a "rapist," then they may conclude that procreation is inadvisable because

² It is interesting to note that the next law of this State, approved the same day, March 9, 1907, is for the *absolute* protection of quail, grouse and prairie chicken, during 10 1/3 months in every year, and of geese, ducks and other water fowl during 5 months, under penalty of \$10.00, and requiring a license to shoot them at any time.

"heredity plays a most important part in the transmission of crime, idiocy and imbecility."

I defy anyone to prove that the fact that a man has committed rape, is any indication that there will be transmitted to his offspring any undesirable hereditary trait.

Of course, I have selected, in order to illustrate the weakness of the law, perhaps the extreme possibility under it. It is possible, logically at least, and if the judges of the facts and probabilities are not restrained by their own good nature or better judgment, that a man who has been convicted of rape upon false testimony, and who shews not the slightest mental defect, shall be emasculated at the will of indifferent or malicious custodians.

The Indiana Legislature has declared that crime, idiocy and imbecility are transmissible. This is the assertion of a fact of nature; the legislative declaration does not make it true; and it is by no means established as a universal truth, and perhaps not at all. But the Legislature has, by implication gone further, and asserted that if a confirmed criminal, idiot, rapist, or imbecile shews signs of probable improvement his defect is not so far transmissible as to make procreation undesirable. In short, the Legislature has accepted as established fact, the finest shading in the laws of heredity, which are not yet established as a fact in their very broadest outlines.

Heredity. Being a mere lawyer, it certainly does not behoove me to be dogmatic upon the subject of heredity, upon which I confess my knowledge is that of a tyro. But the fact which strikes me forcibly is that the suggestions which lead to the sterilization of criminals and imbeciles come from sociologists and amateur reformers, and not from biologists or students of heredity. It might be demonstrated by many illustrations that a popular belief respecting a common fact of heredity may be an actual mistake. Let me take but one example: one of the most firmly fixed of the ideas of heredity is what is known among students of the subject as Telegony, or the transmission to offspring by a later sire of the physical characteristics of a former sire with which the dam had previously bred. I have read some particularly cogent illustrations of this contention, which, taken by themselves, seemed to the lay mind convincing. And yet in the Article on Heredity in the latest edition of the Encyclopedia Britannica, the author says:—

"Although breeders of stock have a strong belief in the existence of this, there are no certain facts to support it, the supposed cases being more readily explained as individual variations of the kind generally referred to as 'atavism.'"³

But this merely serves as an illustration of the possibility of a too confident belief in notions of the heritability of *physical* qualities even among those whose business it is to breed animals for profit. It does not settle or tend to settle the question whether *mental* defects or criminal tendencies in human beings are transmissible.

I know of no reason to believe that mental characteristics are more transmissible than physical ones. Indeed, the scientific students of the subject of heredity do not yet seem to have made bold to dogmatise about the inheritance of mental characteristics in man; and the subject itself appears, so far as I can learn, among those who follow it systematically, to be still in the observational, rather than in the later stage, in which ultimate conclusions are formulated. Physical characteristics are still the subject of hazardous conjectures, such as, for instance, that because a man has 1024 tenth grandparents, this heavy weight of ancestral mediocrity produces regression or progression to type; so that while in a large number of cases of fathers 72 inches in height, the mean stature of sons was 70.8 inches—a regression toward the normal stature of the race—in another large number of cases of fathers 66 inches in height, the mean height of the sons was 68.3 inches—a progression toward the normal⁴. Of course, even here the maternal height is not taken into consideration, but it may be assumed either that there was a normal average of height among the mothers, or perhaps that the impulse toward normality drove the tall fathers to select short wives, and, vice versa, the short fathers to choose tall mothers for their sons. But be that as it may, how can we with any shew of reason, unless we rely upon actual data from experience, collated and properly considered by those specially equipped by education for the purpose, know that "rapists" are more apt to beget criminal sons, independent of environment, than that 72-inch fathers will get 72-inch sons; why not rather assume that the tendencies in mental as in physical inheritance is progression toward normal type represented in the average of the 1024 grandparents in the tenth previous generation with all of the

³ See also article, *Telephony*, in same publication.

⁴ "Heredity," *Enc. Brit.*, 11th Ed.

additional grandparents in the intermediate generations. It is true that after comparison of physical characteristics, a so-called "ancestral law" of heredity has been ventured, to the effect that each parent on the *average* contributes $\frac{1}{4}$, each grandparent $\frac{1}{16}$, and each ancestor of the n th place $(0.5)^{2n}$. But this means that on the average no parent influences his offspring more than one-fourth in any physical peculiarity; and the remaining three-fourths, on the average, are determined (subject always to environment, or post-natal influences) by his other parent, and his more remote ancestors on both sides. Even upon this hypothesis, the writer upon heredity already quoted, says, "But this like all other deductions, is applicable only to the mass of cases and not to any individual case."

I pause to ask what reason or data have we to suppose that mental traits differ in their relative transmissibility from physical traits? And of physical traits the same writer says:

"It follows that the study of variation must be associated with, or *rather* must *precede*, the empirical study of heredity, and we are beginning to know enough now to be *certain* that in both cases the results to be obtained are *practically useless* for the individual case, and of value only when large masses of statistics are collected. No doubt when general conclusions have been established, they must be acted on for individual cases, but the results can not be predicted for the individual case, but only for the average of a mass of individual cases." (The italics are mine).

But these sterilization laws deal with individual cases; and they authorize probably ignorant boards of managers, probably ignorant, not to say malicious, wardens and superintendents, and possibly, if not probably, ignorant institutional physicians to select individual victims for the sacrifice.

Of course, I have some intimation of the dominant and regressive characteristics assumed by Mendel's law, and of the assumption of prepotency in certain ancestors, such as negroes, Chinese and Jews, but I am not aware that it is yet established that criminals or rapists are either dominant or prepotent, whatever may be said of imbeciles or idiots.

I select the sterilization law of Indiana for discussion at this point because it is both the crudest and, as I understand, the earliest of the laws, relating to sterilization in this country.

I have purposely brought it into juxtaposition with the legislative condemnation of Richard Rouse, because to my mind, they both illustrate a thoroughly bad tendency in legislation; the assumption by the Legislature to declare facts of which it is not fully advised, and the attempt to prescribe a penalty unnecessarily harsh, and which in the particular case may be unjust and not calculated to produce the desired result or any substantial benefit to the community. Unless sterilization has a well ascertained beneficial result upon the community itself, it is a punishment simply; and has no justification except as a penalty. Whether it has any beneficial effect upon the community is most assuredly debatable as a fact.

While I would not assume to declare the laws of heredity with that degree of confidence which marks the enactment of the Indiana Legislature, I am aware that the transmissibility of acquired characteristics has been one of the most hotly debated questions among biologists, even when they concern only the external physical appearance, such as the feathers of a bird. I am not aware that biologists have ventured to dogmatize with any certitude upon the transmissibility of mental characteristics in human beings. I am aware that alienists have so far thought that they recognized family peculiarities in mental traits, that they have induced Courts, within limits of close relationship, where the mental condition of a person is in question, to permit evidence of similar mental condition in others of the same family, and that certain students of social conditions have compiled the statistics of certain families, whose environment was unfavourable to high mental development in the individual, and have apparently found an abnormally large number of mental or social defectives in such families, when compared with other families more favourably situated. I am aware also that it is these students of social conditions, rather than alienists or biologists, who have sought to inculcate the conclusion which they have drawn that mental defects and tendencies to crime are transmissible. But I am not aware that anyone, except the Indiana Legislature and its advisers, has yet been so bold as to advance the theory that from the standpoint of heredity a man who shews an individual tendency to improve is a desirable father, while one who exhibits a tendency to remain stationary is an undesirable father, and particularly where the extent of his present deterioration is not defined. It may be that I have misapprehended the meaning of the term *rapist*, as used in this law; and that

it does not mean a person who has been convicted of a single rape; but that it means rather a person who has exhibited a confirmed mental idiosyncrasy in that direction. If the preamble of the law is to be taken as the excuse for its enactment, then it means that whereas confirmed criminals (whatever that may mean), rapists (whether confirmed or not, as the case may be), idiots, and imbeciles, have been demonstrated to transmit their defective characteristics to their offspring, unless they themselves shew signs of improvement, therefore those of these who shew no signs of improvement ought to be the subjects of sterilization.

The objections to the laws.—I contend that there is no sufficient justification in established and accepted fact for this; that the facts are yet debatable; that if the facts were established beyond dispute, the remedy would be of doubtful utility; and that as a dangerous precedent, it should be most carefully scrutinized, if not utterly condemned; and that finally, from the standpoint of sound practical philosophy, it belongs to a class of legislation which has been left behind in the cast off junk of ignorant efforts, with which the past is filled.

While I have, for reasons already explained, taken the Indiana statute as the type for discussion, I shall speak later of the statutes of a similar nature in other States.

The legislation is premature and its theory possibly unsound.—The Indiana Legislature in taking it for granted that criminal tendencies are transmissible, and perhaps even in the case of idiots and imbeciles, has failed to consider the effect of environment in producing undesirable traits in offspring. There are those who earnestly contend that every such undesirable trait is the result of surroundings and example, and not of heredity. It seems certain, to me at least, that the subject has not yet been so fully studied, or the facts so far ascertained, as to establish that criminal traits are transmissible, even if we are agreed upon what constitute criminal traits. Many of our crimes are statutory only, and they do not necessarily indicate depraved tendencies even in the perpetrator, not to speak of their transmissible character. And many of the traits, which in an orderly community are crimes, are those which among leaders of men in political communities have in the past constituted them popular heroes. So there is really no fixity about what constitutes a criminal trait. Napoleon Bonaparte, for instance, had enough traits of a reprehensible kind, to fill

a jail with confirmed criminals, if distributed among the common herd, and not united under a single crown.

In a recent communication to the *New York Times* (dated Dec. 11, 1912), Leonard Darwin, President of the Eugenics Education Society of Great Britain, said of those whom he regarded as certain to pass on mental or bodily defect to offspring:—

“As to whether surgical sterilization should ever be enforced on such persons, we still have an open mind, *but certainly not till further information on this subject is available.*”

In the report of the Wisconsin Branch of the American Institute of Criminal Law and Criminology for 1912 (p. 56), it is said that the combined study of plants, animals, and the human race has not yet ascertained the laws of heredity applicable to habitual criminals, imbeciles and lunatics.

“And it will be only after united collaboration of many investigators and study of vast data of family traits and family pedigrees that we will be able to find out the fixed laws which govern heredity.”

But with us, notwithstanding these conservative views, the legislation moves on apace. In the American Year Book for 1912, it is stated that the Sterilization Law of Wyoming has been held constitutional in an appeal, the case being that of a man convicted of an unnatural crime;⁵ that in Idaho the operation is being used in the hospital for the insane; that in Indiana the operation has been temporarily suspended in deference to the opinion of the Governor, who believes it unconstitutional, though no effort has been made to secure a Court decision.

In the International Year Book for the same year it is said, under the head Penology: “Very recently about eight States have assented to the principle of sterilization of certain classes of congenital criminals.” As a matter of fact, however, the laws do not pretend to confine the operation to “congenital” criminals, and no trustworthy means exists for the determination who is a “congenital” criminal.

One who reads the history of the reformation and counter-reformation period in England, when successive generations of distinguished families were sacrificed to the ideas of criminality which then prevailed, might consider therefrom that at

⁵ It would seem that this is a mistake and that reference is here intended to the case in Washington mentioned below.

last he had struck a line of really congenital criminals, but if he should follow the line he would doubtless find that with changing ideas of criminality, succeeding generations have taken their place as distinguished servants of the common good.

In England for many years the severity of the criminal law was such that we might reasonably expect that if criminal tendencies are heritable, all criminal traits should have been eradicated long since by the elimination of the criminal stock; every crime of any seriousness whatsoever was capital and no compunction was felt about exacting the penalty; possibly the benefit of clergy or the right of sanctuary saved some of these criminals to propagate their kind, but we may perhaps get some idea of the stamping out process if we ponder the assertion that for the single offence of vagrancy, during 36 years of the reign of Henry VIII., 72,000 persons were hanged;⁶ yet the prisons of England have never been empty. Assuredly it is not contemplated that 72,000 persons shall be sterilized in Indiana; yet, if not, what substantial effect shall we consider that the sterilization of a few may have on the criminality or idiocy of its population of 2,700,876.⁷

If the criminal traits were heredity, there are some parts of the civilized world to which we could look with certainty for a depraved population obviously inferior to the rest of mankind, namely, those places which have in time past been used as penal colonies, or to which criminals have been banished. It would perhaps be invidious to name them, but they will readily occur to the reader. As they pass before me in reflection, so far as I am advised, they appear, on the contrary, to have produced an unusually high grade of citizenship. But in answer to this reflection it might be urged, that the crimes of which these ancestors were convicted were in many instances not those which involved real moral turpitude or indicated an actually depraved disposition; that they were largely, if not mostly, merely the protest of an independent spirit against the legally established order of things. In a great measure this is possibly true, but it is not universally true; and enough of crimes of moral turpitude were, it seems to me, involved in the offences, to afford a fair test of the theory, which the In-

⁶ Fisher, *History of Landholding in England*: "The Tudors;" questioned, however, by Froude; Froude's *Henry VIII.* Vol. III, Ch. 16 "The Six Articles."

⁷ Census, 1910.

diana Legislature has accepted and declared as fact. So far, however, as my information goes, there is no confirmation of the theory respecting criminals in the study of the qualities of the present population or the political history of those communities which were the dumping ground for those criminals who escaped with their lives the severity of the "good and wholesome laws" of our righteous ancestry.

As for the idiots and imbeciles, they are doubtless in another class; and it is entirely possible that their mental incompleteness is a transmissible blemish. Indeed, so far as I am advised upon this point, it seem probable. But I am not sufficiently fortified with statistics to know whether this is inevitable, or whether environment and example are not here also factors of large influence. I am not unaware of the result of experimentation in animal and plant selection, but these experiments relate to physical qualities, and are not themselves free from the favourable influences of environment, if not of example. I am even aware of some theories of heredity to which I have already adverted; but here, too, as I understand, it is physical characteristics which are reduced to a probability of recurrence in a fairly calculable number of cases. It would, it seems to me, be premature yet to base legislation upon the acceptance of these theories of heredity in animals and plants; while it would be a bad step indeed, even for a speculative scientist, to extend their operation to the effect upon offspring, of the perhaps accidental arrest of mental development in a human ancestor. Idiocy and imbecility may be due merely to arrested mental development in an individual, and it does not seem to me that the time has yet come when we can safely predicate civil laws upon the possibility that such accidents in individual cases project their consequences through all subsequent time. It is indeed pitiful, from the study of the immediate results, largely economic, to consider an imbecile or an idiot as a parent. But also from the standpoint of immediate offspring it is often likewise pitiful to reflect upon the wrecks, socially considered, who trace their ancestry to the eminently successful men of great wealth whose acquisitive shrewdness not only removed them from the category of idiots and imbeciles, but even of ordinary men. In many instances, it seems to me, the lack of desirable traits in the offspring could be traced to the lack of proper care and example, rather than to any inherited defect. Nor do I mean to say that idiocy or imbecility may not be the outward index in an individual of

a transmissible defect. All I mean is that it is not yet established that it is necessarily so; or that the mere fact of idiocy or imbecility, though without hope of improvement in the individual, makes it certain or even probable that offspring will not be as fully equipped for the battle of life as the offspring of those in the same social environment who are neither imbeciles nor idiots.

It is from these considerations and reflections, which it is true are merely those of the average layman, somewhat informed and capable of reflection, that I deduce the proposition that the time has not yet arrived when a legislature, composed perhaps of ill-informed and non-reflective membership, can safely determine, or enact a law predicated upon, the proposition that "heredity plays a most important part in the transmission of crime, idiocy and imbecility." And I even doubt whether a legislature can delegate to a commission the right or power to determine when in their opinion procreation is undesirable, and therefore whether the legislation would be any protection against a suit for damages by the injured person.

The legislation is of doubtful utility.—But I have also spoken of the doubtful utility of these laws, and here I shall assume for the purpose of the argument, that it is established beyond peradventure that criminal tendencies, as well as idiocy and imbecility, are transmissible traits. Let us consider the practical effect upon the community of such operations. Once again taking the Indiana law as the type (for it is the one least characterized by legal safeguards and consequently the one under which presumably the greatest number of these operations may be expected to be performed), we must consider that even here there are many limitations upon the class of subjects to be treated, and even within the eligible class, I shall assume that the persons charged with the duty of deciding will act with sound discretion and in good faith. The more discrimination they exercise, the less universal will be the supposed benefit. Looking first at this power of discrimination, we see that the responsibility for its exercise is shared by a board of managers, two surgeons and a physician; it must be first recommended by the chief physician and the board of managers (presumably a majority of the latter); and as I construe the law, the two surgeons must share their view. It is, therefore, only in case of this necessary concurrence that the operation can be performed. The greater the care, the less

the utility, unless the Judges so constituted are so accurate in their judgment that they include every possible case of danger to progeny and exclude every possible case of non-danger. It is fair to assume, I think, that the institutions of Indiana have not progressed so far towards perfection of judgment, that these functionaries will develop just 100 per cent. of efficiency in exercising the discretion thus committed to them by law. If they err on the side of over-exercise of power, they will sterilize those who ought not to be sterilized, and thus impair their utility, and if they err on the side of moderation, the State will be correspondingly deprived of the usefulness of their function. That they have been fairly liberal is apparent from the fact that at one institution up to January, 1912, from 1899, the number of operations had been over 700.⁸ But even this practical illustration is not overwhelmingly convincing to me. While every one of these is presumably, physically a potential parent, it would seem that the social opportunities for parenthood were actually far less. The law itself exercises some restraint upon the use of the discretion upon which the operation must be prescribed, for it requires, not only that the functionaries shall determine that procreation is inadvisable, but also that there must be no probability of improvement in the mental condition of the inmate. I shall assume that the functionaries will act in such good faith that they will construe this to mean that the mental condition of the inmate is impaired to such an extent that it may be described as hopeless. Literally, however, the inmate's mental condition may be absolutely normal and altogether unimpaired, for there is no reasonable probability of improvement of the mental condition of a normal man; and yet absence of the probability of improvement is all that the law requires beyond the opinion of the functionaries that procreation is undesirable. But I shall assume that the law actually applies only to a person of impaired mental faculties whose condition admits of no reasonable hope of restoration, and that the impairment is of such nature as to justify an honest body of functionaries in concluding that procreation is inadvisable for fear of the effect on offspring and that there is no probability of improvement in the individual.

But let me pause to ask how many persons of impaired mental condition, who are under treatment in an institution

⁸ "Social Diseases," Vol. III, No. 1, Jan., 1912, p. 11. The submissions from 1899 to 1907, were voluntary.

for their care, and in whom there is no reasonable hope of improvement, and by whom procreation is unadvisable, are in the ordinary course of events likely to procreate. Is it not a fact that in the large majority of instances procreation by such persons is most unlikely? I am well aware that if not confined in institutions they might not be restrained in the exercise of their power of procreation; but is not their presence in the institution a practical restraint, and is not the hopelessness of their condition an earnest of their continual restraint? Of course, I am likewise acquainted with the scandals which have occasionally come from such institutions (not, however, so far as I know, in Indiana) as the result of misconduct in the institution. But these occasional instances are certainly not any more sufficient excuse for sterilization of all inmates, procreation by whom is undesirable, than was Herod's purpose of terminating the existence of a possible rival, an excuse for his slaughter of all infants two years old and under."

It seems to me that this much may be said as bearing upon the utility of such sterilization; idiots and imbeciles are less likely to procreate than normal persons; those who are hopelessly so are still less likely to procreate than those who are still not beyond hope; and those who are in institutions are less likely still than those who are unrestrained; so that those upon whom this operation is to be performed are least likely of all persons in the entire community, excepting the impotent and those confined for life, to beget their kind. It seems to me that no law could be conceived which for its beneficial effect upon posterity would be more negligible than this, measured by these considerations. I know it is contended that the effect upon the patients themselves is beneficial,¹⁰ but I assume, that where demanded for this reason, like every other surgical operation, it may be legally justified without the license of a statute.

Let us pause also to consider the statistics of the situation. In Indiana, as far as I am advised, the number of operations in 13 years was 700, an average of 54 a year. The census of 1910 shewed the population of Indiana to be 2,700,876. Assuming that the operation has now attained its normal rate, that its rate is 54, and that it is performed in all cases at the age of puberty, so as to prevent all procreation whatsoever by

¹⁰ Matt. II, 16.

¹¹ See discussion *pro* and *con*, in "Social Diseases." Vol. III. No. 1, Jany., 1912.

such undesirable parents, and that the average number of children for such parents would be five in a lifetime, then the total number of children directly prevented by such an operation during a half century would be 13,500, that is to say, only one-half of one per cent. of a stationary and unchanging population of 2,700,000, or one-half of one per cent. of a population stationary in numbers, but renewed in individuals once in thirty-three years. If we consider the total population of the State in a period of fifty years, including all of those born and all of those dying, we will see that sterilization of such a small part of the population would have statistically a negligible effect, even if we should include in the calculation of benefits the children in the third and fourth generations whose being is thus prevented.

The legislation in respect to criminals.—Thus far, I have assumed in considering the utility that the Indiana law applied only to idiots and imbeciles, for those are the only persons of whom it seems to me it can with any sort of reason be predicated that there is no probability of improvement in mental condition. But let us now assume that it can be said of a *confirmed criminal* or *rapist* that, though not an idiot or imbecile, there is no probability of improvement in mental condition, then what would be the utility, from the standpoint of diminished posterity, of such operations upon such classes. Assuredly the probability of improvement of the mental condition of a criminal or rapist is a matter which could not be so certainly settled as that of an idiot or imbecile, and therefore, boards of managers in Indiana, being presumably neither reckless nor bloodthirsty, nor yet bent solely upon revenge, could not be expected to sterilize as great a proportion of criminals as of idiots, at the present stage of our knowledge of heredity, notwithstanding the preamble of the law. So that the influence of sterilization upon the diminution of the “hereditary criminal” might reasonably be expected to be far less than upon the hereditary idiot.

But how soon may it be determined that one is a *confirmed* criminal? I confess I do not know what is the legal measure of a confirmed criminal. But I assume that whatever may be the tendencies of a person at the age of puberty toward confirmed criminality, the fact must be ascertained by the event and not by the prophecy; and therefore *confirmed* criminality can not be ascertained until a somewhat advanced age. The character of crime which a “confirmed criminal” commits is

such that presumably it is attended by a somewhat prolonged punishment; therefore before it is demonstrated that a criminal is confirmed or "that there is no probability of improvement in (his) mental condition" he must in the nature of things be so far along in years that it is improbable that he will become a parent, after such time, of the average number of children. The progeny born to such a parent before the determination of his candidacy for sterilization will not be influenced by the operation, and the older he is when he becomes a candidate, the less benefit will the operation confer upon the community. In fact, it seems to me when we consider age, incarceration, and the necessity for determination against the probability of improvement in mental condition, that society has so little benefit to expect from the sterilization of confirmed criminals that it may be considered negligible; and as for the benefit to society from the sterilization of "rapists," *except ad terrorem*, it is certainly negligible. The number of "rapists" is so inconsiderable that their progeny, even if they had fully developed the instincts of their ancestors, would be no substantial menace to the peace and safety of the community. The number of convictions of rape annually in Indiana is unknown to me, but I hazard the surmise that it is a smaller number, doubtless, than the number of persons killed by automobiles. If criminal tendencies were hereditary, then there would be more substantial reason for sterilizing reckless chauffeurs than "rapists."

I have assumed in considering the utility of sterilization, not only that the characteristics of the defective parent are transmissible, but that they are transmissible unmodified. Here again, however, it is necessary for scientific accuracy to consider the modifying influence of the inherited qualities of the other parent, and in later generations, of other stocks. I am not ignorant of the investigations, and particularly in New Jersey,¹¹ into the family histories of selected defective stocks, but even here there are at least four elements which are to be considered before any correct conclusion can be reached and I am not aware that they have been fully considered or that the basis for a correct deduction has yet been laid. These are: the proportion in which the results in the particular cases hold true for like cases; the proportion of normal or super-normal offspring from the same parentage; the influence of

¹¹ Social Diseases, Vol. III, No. 1. Jany., 1912. Also recent investigation in Burlington Co.

environment, including parental example; and the relative frequency in which similar results follow normal parentage in like environment.

Considered, therefore, wholly in its utilitarian aspect, it seems to me that it is fairly demonstrable that this legislation is either altogether unnecessary or of such slight benefit to the community as to be negligible, and in view of the scientific uncertainties of the premise upon which it is based, that it is positively undesirable legislation, in that it accepts as true that which is not yet ascertained and therefore is too likely to stand in the way of actual progress.

From my own standpoint, it is legislation which visits upon the individual the penalty for bad economic conditions; and is one of those raw pseudo-reforms which is wrought on the demand of a dangerous, though sincere element in the community, which on account of its obvious sincerity is too influential in securing the enactment of its emotional conclusions into law to be enforced against its less influential fellows in their common State.

I am not in sympathy, however, with those who would discourage such legislation upon religious grounds. I should regard it as fully justified if the facts seemed to me to justify the premise that the parental qualities were so certainly or even probably transmissible as to be a menace to the welfare of the community, and that in the light of such premise the operation could be considered to be practically useful to the community.

Let me now, for illustration of the really dangerous tendency of such laws, press just slightly further the emotionalism which now demands the sterilization of confirmed criminals, rapists, idiots and imbeciles. I shall embody it in the form of a statute, and leave it without comment, except to say that such legislation is not unthinkable as the legitimate and logical extension of the principle embodied in the actual present law of Indiana.

"Whereas inordinate individual wealth is damaging to society, and undesirable civic tendencies are transmissible by heredity, it is hereby enacted that each association for the improvement of the poor shall call in two philosophic anarchists and one socialist, who shall determine whether any person who shall have acquired inordinate wealth is by reason of the over development of his acquisitive greed a menace to the peace and welfare of the community, and if they so determine,

they may cause to be performed upon him an operation for sterilization to prevent procreation, provided, in no event shall anarchists and socialist receive more than \$3 for their consultation fee."

The helplessness of the victim.—Nor can I forbear a warning based upon the helpless condition of the person upon whom the operation is to be performed. Such a law places him absolutely in the power of those who have control over him; he has no power to speak for himself, and no right to an intercessor; he is to be subjected to the uncontrolled will of those who sit in judgment upon him. And, so far as Indiana is concerned, it may be practiced in every institution having the care of individuals of any of the classes indicated. There are *private* institutions of that character in some States, and the methods of commitment are not always such as to prevent the commitment of those who ought to be at large. It has frequently been charged that cupidity or other selfish reasons have lain at the foundation of such commitments; but under such a law, once a person should be so committed, his future progeny would be subject to the will of the management and its medical assistants. The temptation to affect the devolution of large fortunes would be such as to make it imaginable that a conspiracy could be successfully carried out under the guise of such a law, to make the temptation direct the accomplished fact.

The constitutional aspects of the legislation.—But finally, even if the facts of heredity and statistics should demonstrate the utility of such a law, it would in my opinion, nevertheless override a wise precept of sound political philosophy which is embodied in our Bills of Rights in the phrase:—

"Nor cruel and unusual punishments inflicted."

It is not often that our modern progressives can get a sound lesson in individual liberty from one of the statesmen of Continental Europe during the troubled times of the Protestant reformation, but the following observations from Marillac, a French diplomat, to his master, Francis I., in 1540, following the execution in England of Thomas Cromwell, Prime Minister of Henry VIII., and immediately afterward of three priors of Doncaster, hanged as traitors for having spoken in favour of the Pope, and three Protestants as heretics, seem to me to be pertinent reflections upon the Indiana sterilization law:

"The scene was painful as it was monstrous. Both groups of sufferers were obstinate or constant; both alike complained of the mode of sentence under which they were condemned. They had never been called to answer for their supposed offences; and Christians under grace they said were now worse off than Jews under the law. The law would have no man die unless he were first heard in his defence, and heathen and Christian, sage and emperor, the whole world, except England, observed the same rule.

"Here in England, if two witnesses will swear and affirm before the council that they have heard a man speak against his duty to his King, or contrary to the articles of religion, that man may be condemned to suffer death, with the pains appointed by the law, although he be absent or ignorant of the charge, and without any other form of proof. *Innocence is no safeguard when such an opening is offered to malice or revenge. Corruption or passion may breed false witness; and the good may be sacrificed, and the wicked who have sworn away their lives may escape with impunity. There is no security for any man unless the person accused is brought face to face with the witnesses who depose against him.*"¹²

Let us hold up the Indiana statute, for instance, before the criticism of the 16th century indictment and see how poorly it withstands it; and yet 16th century French diplomacy was not notable for its overwhelming mercy; nor do I conceive that our sociologists wish to return to the horrible scenes which Marillac thus depicted; but they have by their ill-considered legislation opened up, in a minor degree, as sterilization is less immolation, precisely the same sort of iniquitous possibilities which shocked even a 16th century-French-diplomatic sense of justice.

In our days when the political wisdom of the past is being impatiently questioned as an unnecessary restraint upon the present, as though we were suffering the dead and ignorant to curtail the liberty of the present, it were well that we should substitute for the term "Bill of Rights" the phrase "The *Never Again* Clauses" of our Constitutions.

What is not sufficiently impressed upon present-day emotionalists, is that these "iron-bands of the dead," are not the *priori* conclusions of ignorant speculators, but they are the solemn warnings of experience. It is as though they said,

¹² Fronde's Hy. VIII, C. XVII, "Anne of Cleves and Fall of Cromwell."

"So much is clear gain! Profit by our horrible experience to the extent that you should adopt for your guidance, the *knowledge* that the welfare of any community demands, that—*Never Again* * * * !"

Those sages who framed the Constitution of the United States, and submitted it to the people of the States for ratification by their local representatives, framed a preamble that the purpose of the people of the United States in adopting a constitution was, among other things, "to establish justice," "and secure the blessings of liberty to ourselves and our posterity." And that instrument, as the result of *experience*, and not of speculation, provided that no State should pass any bill of attainder or *ex post facto* law (Art. I., sec. X., 1), and that, while Congress might declare the punishment of treason, no attainder of treason should work corruption of blood, or forfeiture, except during the life of the person attainted (Art. III., sec. III., 2).

These were among the "*Never Again*" clauses of the original Constitution. Such intelligent and well-informed patriots as Patrick Henry and George Mason, of Virginia, and Luther Martin, of Maryland, opposed its adoption, however, because it failed to embody other "*Never Again*" clauses which in their opinion experience had demonstrated to be equally desirable and necessary. The result of that opposition was a promise or understanding that amendments would promptly be adopted rectifying this omission, and consequently in the First Congress amendments were proposed, and subsequently adopted, incorporating into the Constitution a few other "*Never Again*" clauses, including these:

"The right of the people to be secure in their *persons* * * * against unreasonable searches and seizures shall not be violated." (Art. IV., Amdts.).

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except, etc. * * *; nor shall any person be subject for the same offence to be twice put in *jeopardy* of life or limb" * * * "nor be deprived of life, liberty, or property without due process of law." (Art. V., Amdts.).

"The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." (Art. IX., Amdts.).

Subsequently in the light of similar hard bought experience, additional "*Never Again*" amendments were added,

which incorporated a prohibition of slavery or involuntary servitude except as a punishment for crime whereof the party shall have been duly convicted (Art. XIII., Amdts.), and the prohibition of the making or enforcing of any law by any State which shall abridge the privileges or immunities of citizens of the United States, or deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of the laws. (Art. XIV., s. 1).

Of these articles only that respecting bills of attainder and *ex post facto* laws, and of the amendments only the XIIIth and XIVth are operative upon the State Legislatures, but the others are types of similar provisions in most of the State constitutions.

To my mind the forcible sterilization of a human being, because of crime is or may be a violation of the spirit if not of the letter of the principle which prohibited the States to pass any bill of attainder or *ex post facto* law, and which refused to Congress the power to enact that an attainder of treason should work corruption of blood, or forfeiture beyond the life of the person attainted; it also may have in it the element of unreasonable seizure of a person; it adds to the punishment for an infamous crime, and subjects the individual to a double jeopardy for the same offence; and it may deprive him of liberty without due process of law; it deprives him of the assistance of counsel; and it is or may be a cruel and unusual punishment; it is dangerously allied to involuntary servitude, in that it makes one creature absolutely subservient to the will of another, when the other chooses to exercise the will; it may be the abridgement of a privilege or immunity of a citizen of the United States, and it may be the denial of the equal protection of the laws.

I do not mean to say at this point that the Indiana, or any other law, is unconstitutional for any of these reasons, for in many of the above respects the Federal Constitution does not restrain the States, and in others it may be doubtful whether the particular law may be found to violate the prohibition. I am speaking now, however, of the *spirit* of individual protection which the Federal Constitution and most of the State Constitutions breathe, and I do say that the Indiana law does, more than some others of these laws, ignore this spirit. It starts with the assumption that the good of posterity and of the community, including that posterity, jus-

tifies subjecting a helpless individual to the irreparable dictation of others in whose power it places him, and makes the possibility of his posterity subject to their uncontrolled judgment, if not their uncontrolled will. It goes further, therefore, than corruption of blood or forfeiture of property; it makes posterity and inheritance impossible; it allows an irresponsible body of persons to impose upon a person already convicted and punished, a further penalty for the same offence if they in the exercise of their uncontrolled judgment guess it to be desirable (for of course they cannot with any certainty foretell the character of the unborn children); and it gives him no opportunity to shew the contrary or to have any assistance of counsel therein.

Much is said in these days of the reprehensibility as a political precept, of the doctrine of individual liberty; and it is frequently asserted, as though individual liberty were inconsistent with it, that in the good of the community lies the true solution of all political problems. But the liberty secured by these constitutional precepts was not secured except for the good of the community. Those who framed the precepts as propositions of sound political philosophy were only considering the good of the community; their idea was that experience had taught that the actual good of the community demanded that each individual of which it is composed should have a degree of protection, though he should be only one man in a given case, from the cruelty or injustice of the remaining members of the community, and that this made for the peace and welfare of the entire community, when each individual of which it was composed had similar protection. It is the individual mind that experiences the benefits of domestic tranquillity and the blessings of liberty; and the liberty accorded by the Constitution is not liberty to injure the community, but the liberty to be let alone, for the true good of the community. In order that the community may be one in which tranquillity is enjoyed and the blessings of liberty experienced, each unit that composes it must be free from unnecessary, unjust or unregulated interference from others, even though they be the remainder of the community. It is no more just, for instance, that the community shall deprive one of its members of his individual property or rights without other cause than its own will, than that the one should do the same to the remainder; the injustice is the same regardless of numbers.

I have said that the Never Again clauses are the result of actual experience. Let us take for illustration, the prohibition of the infliction of cruel and unusual punishment. It is, I think, safe to say that no cruel or unusual punishment was ever inflicted except under pretence of the good of the community. Richard Rouse was boiled to death pursuant to a law enacted by the King and Parliament, because his detestable offence required condign punishment.

It has been said that the phrase embodied in our constitutional prohibitions of the infliction of cruel and unusual punishments has its origin in the Declaration of Rights¹³ affirmed in the Act of Parliament settling the succession of the crown.¹⁴ In this Act, ordinarily styled the Bill of Rights, it is recited that King James Second by the assistance of divers evil counsellors, Judges, and Ministers employed by him, did endeavour to subvert and extirpate the Protestant religion and the laws and liberties of the kingdom, and among other enumerated matters complained of, it was asserted that "excessive fines have been imposed, and illegal and cruel punishments inflicted * * * all of which are utterly and directly contrary to the known laws and statutes, and freedom of this realm" and the Lords and Commons "for the vindicating and asserting their ancient rights and liberties declare: * * * that excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted" * * * "and they do claim, demand and insist upon all and singular the premises, as their undoubted rights and liberties; and that no declarations, judgments, doings, or proceedings, to the prejudice of the people in any of the said premises ought in any wise to be drawn hereafter into consequence or example."¹⁵

The constitutional provision against cruel and unusual punishments derived from this Declaration and Bill of Rights has been adopted in 36 States of the United States, including Indiana, Connecticut, New Jersey, New York, and Michigan, which have recently adopted sterilization laws. At one time it was seriously questioned whether the prohibition in the Federal Constitution did not extend to State legislation, but this view was overruled.¹⁶

¹³ Hallam's Constitutional History of England, p. 106.

¹⁴ Wm. & M. Session 2, C. 2 (A. P. 1688).

¹⁵ Stubbs Select Charters, Bill of Rights, p. 523.

¹⁶ (See dissent of Field J., in *O'Neil vs. Vermont*, 144 U. S. 337, in which he took the view that by reason of the prohibition of the XIVth amendment it is one of the privileges and immunities of citizens of the United States which no state can abridge, to be free from the infliction of cruel and unusual punishments).

Cruel and unusual punishments.—Many illustrations might be cited of what has been considered a cruel and unusual punishment, but I shall be content to cite only those which are somewhat analogous to sterilization; among which are those which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering (dissent of Field, J., *O'Neil v. Vermont*, 144 U. S., at 339). One of the illustrations of unconstitutional cruel and unusual punishments which has been more than once suggested in judicial opinions is *castration*.¹⁷

In the recent case of *Weems v. U. S.*, 217 U. S., at p. 372, Mr. Justice McKenna, speaking for a majority of the Court, said of the views which caused Patrick Henry and others to advocate a Bill of Rights in the Federal Constitution:

"They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain and mutilation. With power in a Legislature, great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accomplishments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say 'coercive cruelty' because there was *more to be considered than the ordinary criminal laws*. Cruelty might become an instrument of tyranny; of *zeal for a purpose*, either honest or sinister."

In the *Weems Case* (p. 390), in a dissenting opinion, Mr. Justice White summarizes the cruel and inhuman punishments condemned in the English Bill of Rights as the inhuman bodily punishments of the past, or the infliction of usual punishments to an unusual extent, such as the annual exposures in the pillory and the annual whippings imposed upon Titus Oates for the balance of his natural life, or the in-

¹⁷ See *Weems v. U. S.* 217 U. S., at p. 377; *Whitten v. State*, 47 Ga., at p. 301.

fliction of illegal punishments under claim of judicial discretion.

In respect to a "criminal" or "rapist" sterilized under the Indiana law, I think I can aptly quote again from the opinion of Mr. Justice McKenna in *Weems v. U. S.* (217 U. S., at p. 366), in condemning as contrary to the spirit of our Bill of Rights a sentence imposed in the Philippine Islands, which directed confinement for a period, with chain at ankle and wrist, hard and painful labour, no assistance from friend or relative, no *marital authority or parental rights* or rights of property, and no participation in the family council; and after his release from prison a perpetual limitation of his liberty:

"He is forever kept under the shadow of his crime. . . . He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude."

The punishment of sterilization visited upon Peter Abelard by or with the connivance of the Canon of Notre Dame, possibly with a sense of rectitude, that it was a just revenge, was at the foundation of one of the most pathetic tragedies that has saddened the annals of mankind. Both he and the wonderful Heloise were forever kept under the shadow of this revenge; and he was driven in other scenes and among other people to a fruitless effort to retrieve his fall.

I know, of course, that in the case of sterilization, it is claimed that it is for the good of society to deprive the victim of the right of posterity, and is, therefore, not to be viewed as a punishment at all. But is society any more greatly benefited by its regard for posterity than for its own present good, supposed to be derived from inflicting a punishment, cruel and unusual, as a deterrent to like offenders? Yet cruel and unusual punishments are forbidden, regardless of any possible good to present or prospective society.

In Patrick Henry's opposition to the ratification of the United States Constitution, without a Bill of Rights, he said:—

"But Congress may introduce the practice of the civil law in preference to that of the common law. They may introduce the practice of France, Spain, and Germany, of torturing to extort a confession of crime. They will say that they might as well draw examples from these countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of the government that they must

have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone. And can any man think it troublesome when we can by a small interference prevent our rights from being lost?"¹⁸

Just as France, Germany and Spain, and occasionally English sovereigns, justified torture, in the interest of public safety, so now the sponsors of the sterilization laws justify mutilation in the fancied interest of the public welfare. But my thesis is that the public welfare requires neither torture nor sterilization, and that it weakens our sense of respect for the rights of each individual man to give way to the clamour of a few enthusiasts, that the rights of the helpless or condemned shall be committed to the discretion of others, who may or may not sterilize them, if they see fit, provided they fall within certain categories of beings committed to their care.

From the historical grounds upon which the constitutional prohibition is based, it might be reasonably contended that punishment, in the constitutional sense, includes cruel and unusual bodily inflictions under colour of law, or in the exercise of official power, whether imposed as a penalty for crime, or because of crime or incapacity, either under pretense of, or because of a fancied, assumed or actual benefit to society; and that sterilization, even though not painful, is both cruel and unusual and falls within the province of the prohibition.

But I do not base my general argument upon the fact or contention that any such law is beyond peradventure unconstitutional. I recognize that it may escape on the ground that it does not authorize *punishment*.¹⁹ But I contend that it is nevertheless undesirable because it weakens that spirit of respect for the clauses of our Bills of Rights, derived from painful experience, whose continued observance is essential to the establishment of justice and the enjoyment of domestic tranquillity; for, what a few sincere emotional enthusiasts accomplish to-day for a fancied public good, may shew the way hereafter to a few purely selfish sinister interests, how they also may weaken the constitutional safeguards, to the utter destruction of domestic tranquillity or the disestablishment of actual justice.

¹⁸ Quoted by Mr. Justice White in *Weems* case, at p. 396.

¹⁹ E. g., *Hawker v. New York*, 170 U. S. 189, *People v. Hawker*, 152 N. Y. 234.

In the making of laws we argue much from analogy; and if it has appeared proper to some sincere people to relax our constitutional vigilance over the rights of the individual man for the fancied good of the community, then shortly a few more other people, prompted by selfish interest or their peculiar views of the common good, will see in the precedent of sterilization of idiots, imbeciles, confirmed criminals and rapists, an incomplete list, and we may expect the list to be enlarged to suit the views of other reformers.

The fancied good of the community in the infliction of punishment has already called upon Courts in this land to determine whether or not the following punishments were cruel and unusual, with varying results: a sentence by a Justice of the Peace to pay a fine of \$9,140 and costs or suffer imprisonment for 79 years, for selling intoxicating liquor in Vermont (where it was illegal) from New York (where it was legal); sentence reduced on appeal to the County Court in Vermont²⁰ to \$6,638.72 or 5½ years; not considered by the Supreme Court of the United States to violate the Federal Constitution,²¹ though this caused a vigorous dissent from Mr. Justice Field; and I venture to suggest that the sentence itself, in the extent of its possible imprisonment ought to shock the sense of justice of mankind but it followed as a consequence upon the power committed to a Justice of the Peace by sober-minded citizens of Vermont.

In Louisiana, where defendants were convicted of violating a city ordinance by trespassing on a city park 72 times in 100 minutes, they were sentenced to pay a fine of \$720 or to be imprisoned 2,160 days (5 years, 334 days). This was held a cruel and unusual punishment.²²

In Michigan a sentence of 50 years for an attempt, not amounting to rape, was considered unusual and excessive, and it was said that punishments are not left to the mere caprice of the judiciary.²³

In Kentucky the corporal punishment of a free black for raising his hand against a white in self-defence was held cruel and unusual.²⁴

²⁰ *State v. O'Neil*, 58 Vt. 140. See statement of Justice Field, *O'Neil v. Vermont*, 144 U. S., at pp. 338-339.

²¹ *O'Neil v. Vermont*, 144 U. S. 323.

²² *State v. Garvey*, 48 La. Ann. 527, 35 L. R. A. 561.

²³ *People v. Murray*, 72 Mich., 10.

²⁴ *Ely v. Thompson*, 3 A. K. Marsh. 70, 74.

In a Federal Court, it was held a cruel and unusual punishment to chain a prisoner by the neck, so that he could neither lie nor sit down.²⁵

In Michigan it was held a cruel and unusual punishment to authorize the arrest and remand without warrant, of a pardoned convict upon an alleged breach of condition of his pardon.²⁶

In Wisconsin a law making it a felony for a tramp to travel outside of the place of which he was an inhabitant, and prescribing a diet of bread and water upon conviction, was considered probably unconstitutional.²⁷

These instances of cruel and unusual punishments are not all analogous to the punishment of criminals by castration or sterilization; but they serve to shew that all over this land, the constitutional safeguard against cruel and unusual punishments is a necessity for the protection of individuals against the uncontrolled judgment of other individuals acting under the colour of authority.

In Michigan, in commenting upon the arrest and remand without warrant of a pardoned convict, above mentioned, the Court said:—

“The consequences of this Act, if sustained, may not always be visited upon those who have been convicts. It is liable to be used against an innocent and unattainted man. . . . The iniquity of such a statute is not to be measured in words. It is a menace against the personal liberty of the citizen, to be removed at once, when the attention of the Court is called to it.”²⁸

It requires no great stretch of one's imagination to picture some zealous advocate of a return to simplicity of life, reasoning that a criminal of high finance, who chances to be one of the few convicted, should be subjected to this treatment merely because the reformer abhors his conduct; and this would be possible under the literal terms of the Connecticut sterilization law (of which I shall speak later), if the board should conclude that his children would have an inherited tendency to crime, though I can not conceive that any one could reasonably maintain that the traits of such an offender are hereditary.²⁹

²⁵ *Re Birdsong*, 30 Fed. Rep. 500, 4 I. R. A. 628.

²⁶ *People v. Moore*, 62 Mich. 502.

²⁷ *Johnson v. Waukesha Co.*, 64 Wis. 281, 288.

²⁸ *People v. Moore*, 62 Mich. 502.

²⁹ Conn. Law, 1900, C. 209.

It may be recalled that in the Petition of Right presented by Parliament to Charles I., in 1628, one of the grievances set forth as against the Great Charter was the appointment of various Commissions under his Majesty's seal with power to proceed according to justice of martial law, by pretext whereof persons had been put to death by the Commissioners; though Parliament had declared that no man should be forejudged of life or limb against the form of the Great Charter and the law of the land.³⁰

Now these Boards of Managers, and physicians and surgeons, and other functionaries empowered by these sterilization laws to determine whether persons in their custody shall be sterilized, appear to me to be closely analogous to the Commissions complained of in the Petition of Right; they are authorized to "forejudge life or limb" according to their own judgment as to whether procreation is undesirable.

In one well-known case that has recently been much talked about in the newspapers, a man has been adjudged incapable of managing his affairs in New York, while in Virginia he has been adjudged competent. In New York, such a person, if committed to an asylum, might be sterilized, while in Virginia he could not be lawfully deprived of any liberty.

The limits of legislative authority.—If a legislature can constitutionally sterilize a criminal or an insane person, it can constitutionally sterilize any other class of persons whom it deems it desirable for similar reasons to sterilize. Using an illustration of a class, which I have already used, it could sterilize multi-millionaires, whom it might consider "undesirable citizens" or "malefactors of great wealth," for it might declare in a preamble that the sons of these tend to become a menace to the community, as an idle and licentious class; similarly it could sterilize clergymen, pursuant to a preamble that their sons are frequently charged with being on the average, worse than other men's sons.

When one admits the power of the legislature to authorize the act of sterilization and to define the class to be sterilized, he must admit the power to extend the class, if statistics more or less convincing could be cited to shew the tendency of the offspring of any particular class in the community to exceed the average, or indeed to lower the average moral tone of the community. There is scarcely any class which they might not

³⁰ Petition of Right, 7, Harpers Enc. U. S. History, p. 155.

plausibly invade with a supposedly philanthropic sterilizing scheme.

But so long as we have any constitutional guaranties of individual liberty it might be reasonably argued that the individual's right to have a family and to be a parent is analogous to his right to live, to have liberty and to acquire property; it is certainly as ancient and as universal. It might be reasonably questioned whether a legislature has the power to prohibit a marriage of adult sane persons; it certainly cannot transfer the property of an adult competent; his right of property is beyond its reach.²¹

And similarly his right of liberty should also be beyond its reach, except as a punishment for crime, in military service, and because of his incompetency and consequent danger to himself and the community by his conduct. But I have already demonstrated that as a mere punishment sterilization seems to me to be unconstitutional, and that the good of the community or of posterity can not excuse it; while a person does not by insanity lose his constitutional rights and the constitutional custody is only to the extent reasonably necessary to protect him and society from his possible violence.

However, such legislation might be held to be constitutional on grounds of public welfare, and because the Courts might not question the legislative conclusion that sterilization does prevent the transmission of heritable undesirable qualities, and is therefore for the benefit of the community, I have still said enough to satisfy myself at least, that upon constitutional grounds such legislation is unwise; and from any other standpoint it is of most doubtful utility and therefore it ought to be discouraged.

I shall not attempt to criticize it from the standpoint of special provisions of State Constitutions, not already mentioned.

Sterilization laws in other States.—But before closing I shall point out a few of the differences in the several State laws on the subject. I have taken the Indiana law as the type, merely because it is, so far as I know, the prototype; but other legislatures appear to have recognized the soundness of some of the criticisms, though they have yielded to the persuasion of the advocates of the law. It seems to me that it must be admitted that if there is any utility what-

²¹ *Brevcoort v. Grace*, 53 N. Y. 245.

soever in the operations, it is impaired by the individual safeguards; for the more the safeguards the fewer the operations.

For instance, in New Jersey (Act 1911, ch. 190), the subject may have counsel. There is a formal hearing, evidence is taken, and the Supreme Court may review the determination and stay the order and there is a delay of five days after a final order, before it can be carried into effect; thus giving an opportunity to apply to the Court before rather than after the operation.

In Connecticut (Act 1909, ch. 209) provision is made for examining the record and family history of the subject, so far as ascertainable. But the law applies as well to State prisons as to State hospitals for the insane; and the report as to the inadvisability of procreation may first emanate from the warden, but is passed on by a board of two surgeons and the physician or surgeon in charge; the *surgeons* are presumed to be able to form an opinion whether procreation would produce children with an inherited tendency to crime, as well as insanity, feeble-mindedness, idiocy or imbecility; they are selected by the directors of the State prison and State hospitals for the insane respectively.

One may be permitted to doubt whether even skilled surgeons can safely predict whether a person in State prison will have a criminal for a son; yet under the law a majority of the board (consisting of the physician or surgeon in charge and two skilled surgeons) may form and act upon their *opinion* on this point. There is no provision for counsel, hearing, formal evidence or Court interference or review. Here again is a "Commission" proceeding at variance with the established course of the common law, which caused the remonstrance in the "Petition of Right."

In New Jersey, though the right to counsel, hearing and Court review is prudently preserved, the right to sterilize extends to feeble-minded, epileptic, certain criminal and *other* defective inmates confined in reformatories, charitable and penal institutions (Act 1911, ch. 190). And it even extends to "Morons," a class of human beings not yet defined by the Century Dictionary, but which I understand to be individuals of intellect developed below the standards of certain tests for age; for instance, a person of mature years who has the mental equipment of a child is a moron, though neither idiot or imbecile.

Thanks to the conservatism of lawyers who have "technical" rules of construction of which one is the maxim "*noscitur a sociis*," other defectives will probably not be construed in the Courts, at least, to be men with one leg, or one eye, or who are merely color-blind, and whose hereditary tendency in this direction is not yet fully ascertained or declared even by a State legislature.

The New Jersey law also provides for such operation as shall be decided by the board to be most effective; I shall assume until disillusioned, that this would not include or exclude *homicide* under the auspices of the board! The act also declares that if its provisions with reference to any class of persons shall be held unconstitutional and void, it shall not invalidate the entire act.

I say that acts of this sort are flirtations with danger, and shew that we need a constitution to prevent a chaos of *isms* and *asms*, destructive of justice, the blessings of liberty and domestic tranquillity. The New Jersey act would, if it were not for the presumable good faith of the examiners, literally authorize the sterilization of anybody and everybody in all reformatories, charitable and penal institutions of the State, who were in anywise howsoever defective, upon the mere irresponsible opinion of an irresponsible board.

The New York law³² is substantially similar to the New Jersey law, in its material provisions, though silent on "morons"; it applies to the State hospitals for the insane, State prisons, reformatories, charitable and penal institutions; the operation may be performed if in the judgment of a majority of the board procreation would produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy or imbecility, and there is no probability of improvement to an extent to render procreation advisable, or if the physical or mental condition will be substantially improved. Both under the New Jersey and the New York laws, the criminals to be so treated are those who have been convicted of rape or of such succession of offenses against the criminal law, as in the *opinion* of the board shall be deemed to be sufficient evidence of confirmed criminal tendencies.

What possible basis can such a board have for any such opinion? And what possible ground can exist for any opinion that a man who has once been convicted of rape,

³² C. 445, N. Y. Laws, 1911.

will produce children with an inherited tendency to crime, insanity, feeble-mindedness, idiocy or imbecility? Is it not irresistibly obvious that in the case of such a man at least any such operation is simply and unquestionably a punishment for crime, and as such cruel, unusual and unconstitutional, and the statute not the slightest protection to the participants in the operation for civil liability to him?

The New York law lacks the provision of the New Jersey law, that if one of its provisions is held unconstitutional it shall not invalidate the remainder.

In Washington (Act 1909, ch. 249, sec. 35) the Criminal Code authorizes the penalty of sterilization for criminal abuse of a female under 10 years, or rape, or habitual criminality, in the discretion of the Court.

This act would appear to me to be a violation of the constitutional principle prohibitive of cruel punishments.²³

The Supreme Court of Washington has, however, held that the Washington statute authorizing vasectomy upon a person convicted of rape is not a cruel punishment; it therefore refused to disturb the judgment of the legislature.²⁴ In reaching this conclusion it pointed to the statutes of California (1909, ch. 720), Connecticut (1909, ch. 209), Indiana (1907, ch. 215), Iowa (1911, ch. 129), New Jersey (1911, ch. 190), as based on the theory that modern scientific investigation shews that idiocy, insanity, imbecility and criminality are congenital and hereditary. It quoted from such "authorities" as one medico-legal journal and one medical journal and two daily papers, from one Judge and two physicians, and cited the approval of one local physicians' club, one district medical society and one local society of social hygiene. I submit that the daily papers are not eminent scientific authorities, and should not be accepted as such; that an eminent Judge is not necessarily a scientific investigator respecting heredity, and that the two physicians cited were speaking of the painlessness of the operation as performed by them. The Court refused to consider the operation cruel, after citing these "authorities" on its painless and praiseworthy character. But are we then to understand that with the introduction of anaesthetics mutilation became constitutional? For if vasectomy is sustained because it is painless why not also sustain every other operation for mutilation as a punishment which a legislature may

²³ Wash. Const., Art. 1, S. 14.

²⁴ *State v. Feilen*, 26 Pac. R. 75, Sept. 3, 1912.

choose to inflict, regardless of its permanent after effects upon the victim, if a few physicians and newspapers may be found to assert that it may be performed without physical pain? I submit that sober second thought ought to require higher authority for propositions in the laws of heredity, and greater reasons for justifying unusual punishments than that the operation may be inflicted under the supervision of skilled surgeons without severe pain.

It may be that recent legislation may have extended similar activities to other states, for "reform," like measles and scarlet fever, is contagious. But I have said enough to indicate the character of the statutes. In the report of the Wisconsin branch of the American Institute of Criminal Law and Criminology for 1912 (p. 78) the states then having such laws were enumerated as follows: Indiana, Iowa, New Jersey, California, Washington, Connecticut, New York and Utah. Since that time Michigan has been added to the list.

A Veto in Vermont.—In the light of these laws, it is refreshing and reassuring to me, at least, to note that it is not all men in responsible positions who have lost sight of these objectionable tendencies.

The Governor of Vermont, at the legislative session of 1913, was called upon to consider and veto a bill which was, according to the legislative standard for such laws, carefully framed, for it was limited to those in hospitals for the insane, state prison, reformatories and charitable and penal institutions; it excluded women over forty-five years of age; it provided for written notice to the insane and feeble-minded, and to parents and guardians of minors; for a hearing of those who desired to make defense, a fair and impartial trial by the board, the right to introduce witnesses and the right to representation by counsel; and it authorized an agreement on the part of the subject (though lunatic or imbecile). I am advised that the Governor justified his veto by a written opinion of the Attorney-General, who criticized the bill as making an unfair, unjust, unwarranted and inexcusable discrimination against persons so confined, while it made no similar provision for those similarly afflicted but not confined, or for criminals who had served their sentences; this he regarded as intolerable under the constitution of the State; he regarded the discrimination in favour of women over 45 years of age as equally unconstitutional, in

that 45 is not the natural limit of conception in child-bearing;³⁵ he criticised the act because it made no express provision to enable persons in confinement to appear before the board, though it required the board to hear them, and because it ignored the incapacity of the person to make a request or perform a legal act. (I assume this had reference to the physical incapacity of a lunatic or imbecile, and not to the factitious incapacity of a criminal, though perhaps he considered that the bill did not by implication remove the legal incapacity of the criminal). He also condemned it because it authorized the board to act on the evidence adduced, but prescribed nothing in respect to the kind of evidence which it might receive; and because it made the decision of the board absolute, without any appeal; he stated that the Supreme Court of the State had repeatedly held that the taking of land for a public highway under similar provisions was not due process of law; he indicated that the bill would permit the infliction of an additional penalty for crimes already committed and upon one who had already reformed; this he regarded as unconstitutional (doubtless as an *ex post facto* law). He further objected that it authorized imbeciles and lunatics to bind themselves by agreement, something which had never been permitted by any Court of Justice.

Notwithstanding the possibility of this arraignment from a cursory examination of the bill, I understand that the Vermont House adopted it originally by a vote of 85 to 72, 66 members not voting, while the Senate passed it over the veto by a vote of 13 to 10. I am advised, however, by the Secretary of Civil and Military Affairs that the veto was sustained by the Legislature.

Conclusion.—Whatever may be the conclusion of the reader in respect to the soundness of my views upon the utter impropriety of these laws in the present state of our knowledge of heredity and from the standpoint of conservative regard for constitutional principles, it seems to me that even the advocates of the laws must see, if they consider the foregoing assault upon them, that they ought to take into their counsels some conservative who will help them frame a uniform statute which will offer some sort of

³⁵ *Washington v. Bank for Savings*, 65 App. Div. N. Y. 338, at p. 341.

reasonable and ordinarily decent protection to a helpless unfortunate, be he lunatic or criminal, against the ignorance or indifference of incompetent persons who may sit in judgment upon him.

I have written this article as a danger signal against unnecessary and dangerous nostrums in legislation. Some philanthropist, whose notions of heredity are not well grounded, rushes to the legislature with the panacea of sterilization; another with regulation but authorization of benevolent monopolies, and before long there is an avalanche of legislation which destroys the ancient landmarks of peace and safety to the honest, hard-working, or merely unfortunate citizen, and domestic tranquillity and the reign of justice are alike destroyed.

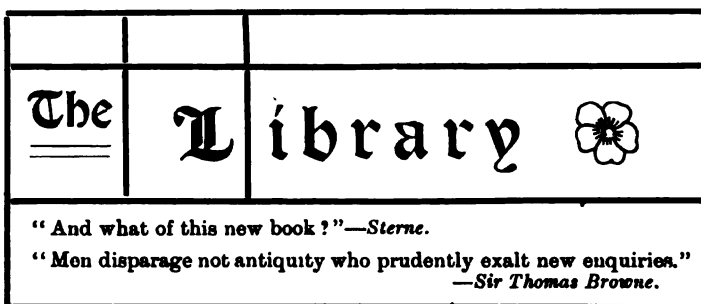
Our Bills of Rights are full of the concise expressions of the experience of political philosophers after viewing reflectively the mistakes of ardent enthusiasts of the past. These may not be the last words of political wisdom, but they are at least wise brakes.

Before advocating such laws, I would wish to be assured that the interests of the community demand them; that the assumed principle of heredity be true; that the safeguards of liberty are not to be thrown aside for a merely imaginary good; that they be preserved as far as possible and that crude legislation (and in my view it is all crude) be avoided.

Nor can I close without the warning that prisons and insane asylums have been the most shameful institutions of so-called Christian civilization; that in them cruelty has been systematically practised and in many instances the innocent made to suffer more than in any other establishments.²⁰ After a great and continual struggle, civilized governments are just succeeding in throwing the safeguards of enlightened law about their management.

But now we are confronted with a new flood of laws, which leaves the personal liberty and a part of the life of individual and posterity to the arbitrary judgment and guess, if not the mere whim or caprice, of possibly unskilled and unsympathetic Judges, without any of the substantial safeguards, which we all regard as our greatest inheritance from the English Constitution and the founders of our own nation.

²⁰ On the very day when I write this, in my own state, a report to the governor arraigns a prison physician as both cruel and indifferent.



The Law Relating to Wills. By R. E. Kingsford, M.A., LL.B.
Toronto: Carswell Company, Limited. Price, \$10.

Jarman's Treatise on Wills, sixth edition, has been followed by Mr. Kingsford in his very able treatise. A table is given in the present work shewing the sections which correspond to the Imperial Wills Act. This will enable the practitioner in each of the provinces which has adopted the English Act to refer to the corresponding sections of the provincial Act. The Wills Act of Ontario, being recently revised, is printed in full where necessary. At the end of each chapter is a very complete collection of Canadian cases printed in black type, which will be found of great service to the profession in general. Much care has apparently been given to the preparation of the work, and as a reference to the various headings in the very full index will shew, the matter has been arranged for easy reference. There is no doubt that the wish of the author will be gratified and that the work will be of great service to Bench and Bar alike.

A Manual of the Principles of Equity. By Indermaur and Thwaites.
7th edition by Charles Thwaites. London: George Barber.
Toronto: Carswell Company, Limited. \$5.

This work is primarily intended for the use of students and is most admirably suited for that purpose. A short description of the Court of Chancery is given shewing the growth of equity till it became a fixed system. Then follow the maxims, and part two deals with trusts and trustees, and allied subjects. A large number of illustrations are given which will undoubtedly be of great service to the student, as will also the thorough and complete index.

Trade Union Law. By Herman Cohen, of the Inner Temple, Barrister-at-Law. Third edition. London: Stevens & Haynes. Toronto: Carswell Company, Limited. \$2.

At a time when trade unions have become so much a factor in everyday business a work like the present is of peculiar value, and the present edition of this handy volume presents in concise form the Trade Union Act of 1913, being 2-3 Geo. V. ch. 2 (Brit.). Some of the principal chapters discuss this subject with reference to restraint of trade, trades disputes, conspiracy in trade disputes with reference to protection of property.

In the chapter on the right to expel, trades unions are considered in the nature of clubs. Altogether this little volume will be found useful to the practitioner in looking up many a point not to be found elsewhere.

A Digest of the Law. Practice and Procedure Relating to Indictable Offences. By Arthur Denman, M.A., F.S.A. London: Sweet & Maxwell; Stevens & Sons.

As the title of this work sets out, it is a digest of the law, practice and procedure relating to indictable offences and contains the pith of Archbold's Criminal Pleading, arranged for quick reference by the practical lawyer. No better description of the book can be given than the above, as the various titles are alphabetically arranged and easy to find, with a splendid index. The volume is dedicated to Lord Alverstone, Lord Chief Justice of England, by permission, which speaks volumes for the esteem in which the work is held by those best qualified to judge.

A Manual of British Columbia Company Law. By Alexander H. Douglas, LL.B., of the Middle Temple, Barrister-at-Law, and of the Bar of British Columbia, and George Rorie, C.A. (Edin.). Calgary: Burroughs & Co. London: Jordan & Sons, Limited.

This volume presents in popular form British Columbia Company law and will be found particularly useful to those connected with or having interest in joint stock companies. Not the least useful will be found the summaries of the necessary steps to obtain incorporation and the returns to be made to the government at the close of the year. A short history of joint stock company legislation is given, followed by instructions as to the proper method to pursue in obtain-

ing incorporation, the conduct of meetings and general carrying on of company business. Part four of the volume contains the various forms necessary in connection with company work.

Great credit is due the publishers, Messrs. Burroughs & Co., of Calgary, for the excellence of their publication.

A Collection of Latin Maxims and Phrases Literally Translated. By John N. Cotterell. Third edition. London: Stevens & Haynes.

Too great stress cannot be laid upon the advantage to be gained by a thorough knowledge of the leading Latin maxims so frequently quoted in legal works, but unfortunately translated with difficulty by the ordinary practitioner, especially in Canada. This little volume of some seventy-five pages presents the principal legal maxims of common law so ably amplified in the well-known work of Broom.

A Digest of Equity. By J. Andrew Strahan, M.A., LL.B. of the Middle Temple, Barrister-at-Law. Third edition. London and Winnipeg: Butterworth & Co.

This volume gives a very careful and illuminating exposition of trusts in the various forms, trustees, their appointment, duties, powers, indemnity and liability for breach of trust. An able exposition is given of liens in the nature of trusts and when relief will be granted for their non-fulfilment. The latter portion of the volume deals with assets and administration, with chapters devoted to executors and administrators.

The Phenomena of War and the Idea of Peace. By George del Vecchio, University of Bologna. Translation and introduction by Mariano Castano. Madrid: Hijos de Reus.

This monograph by Professor del Vecchio is a translation in Spanish of this able work which has appeared in nearly all the languages of Europe. It is a particularly able philosophical exposition of war and peace and will amply repay careful perusal.

The Statutes of the Province of Alberta have been recently issued. The celerity with which the western pro-

vince procures the translation of its business might well be taken under consideration by the older provinces, particularly Ontario, where those in charge of the issue of the statutes seem to be sleeping as sound as the far-famed "Seven Sleepers."

The Fourth Annual Report of the Commission of Conservation, Canada, of which the Honourable Clifford Sifton is chairman, is to hand and deals particularly with forest conservation, fisheries, and water-power, in addition to which it contains an agricultural report of an interesting nature. The Commission make certain recommendations regarding the prevention of the smoke nuisance and laws relating to town planning in Canada.

Forest Conditions in Nova Scotia. By B. E. Fernow, LL.D. of the University of Toronto. Published by the Commission of Conservation.

The object of this volume is to preserve the forest already existing and to undertake a systematic method of reforestation.

THE BEST FICTION.

Laddie. By Mrs. Gene Stratton Porter. Toronto: Thomas Langton, \$1.50.

The Harvester, published at a time when the taste of the public was satiated, one might almost say vitiated, by a surfeit of trashy novels, was a revelation,—Freckles, a delight,—and The Girl of the Limberlost and The Moths added lustre to the already distinguished name of the author, but so soon as an attempt is made to write a novel with an obvious purpose it is a failure, and it is hard to realize, after reading "Laddie," that it is by the same author as "Freckles" and "The Harvester," the book is such a disappointment after its predecessors. If Mrs. Porter had written a book of sermons and then a novel with the impossibly perfect Laddie as hero of the latter, there might have been some excuse, but the combination does not mix. The best advice one could give the author is "take a rest."

The Sixty-First Second. By Owen Johnson. Toronto: Copp Clark Company, Limited. \$1.35.

One of the cleverest of a very prolific season of clever books. The whole plot is well thought out and well developed and there is none of the dragging so evident in most novels with a similar theme. "Stover at Yale" was clever, but "The Sixty-first Second," (using the slang of the day), gives it points and then some.

The Mating of Lydia. By Mrs. Humphry Ward. Toronto: The Musson Book Company, Limited.

The distinguished author of "Robert Elsmere" and other notable books apparently finds it necessary to descend to pot-boiling, which is certainly a great pity. The present volume will add no new lustre to Mrs. Humphry Ward's fame as a writer.

Gold. By Stewart Edward White. Toronto: The Musson Book Company, Limited.

This book is a tale of the rush to California in '49 and presents the varied experiences of those who participated in the wild rush for gold, now become so familiar to readers of fiction by the many stories published since the rush to the Klondike.

It is not to be expected that a writer will always maintain the same standard of excellence, and in justice to the author of "The Blazed Trail" and "The Riverman" it must be stated that "Gold" is not at all equal to these splendid books.

The Judgment House. By Gilbert Parker; illustrated by W. Hathrell, R.I. Toronto: Copp Clark Company, Limited.

The years have given the author a keener insight and broader outlook. The characters in "The Judgment House" are drawn with a facile yet delicate pen, the working of the minds of the characters is singularly well analyzed and the people in the book are real, living, throbbing human beings. Covering a period which is writ large in British annals, the author has chosen a splendid theatre for the staging of his work. "The Judgment House" is a powerful book and is without question the best of the many entrancing stories given to the public by this author.

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WHAT THE UNIVERSITY CAN DO FOR THE STATE.

At a special luncheon of the Canadian Club held on the 21st October, Dr. Van Hise said:

Gentlemen of the Canadian Club: It is a very great pleasure indeed for me to respond to the cordial invitation of your secretary to be present and address you. I suppose that not many of you have seen as much of Ontario as I have seen. I have traveled your railroads from one end of the Province to the other; I have walked along your railroad lines; canoed your lakes and streams from Winnipeg to Temiskaming. And therefore I know something of the growth of this Province, and of this city of Toronto, during the past twenty-five years. Whenever I come to Toronto again, I am thrilled with the expansion of this city and its additions.

This morning I asked the secretary of the American Club, Mr. Miller, to take me out to the residential suburbs; and I was very much pleased and amazed at the growth of the residential portion of the city since I was here three or four years ago.

In speaking of this subject of the university and its relation, its service to the State, I am talking on an assigned subject. Your secretary asked me to speak upon it. I suggested one or two other subjects which might be more interesting, but he insisted upon this one, therefore I am to speak on it.

There is no fundamental difference between the universities in the United States, whether State or endowed, and the universities of Canada or of England. The universities of the United States were originally patterned after the English colleges or universities. Some have

developed in different directions; some have gone in this, that, or the other direction; but all have the fundamental purpose of teaching ideas and ideals to the youth of the nation and the advancement of knowledge. And however varied the ways in which these two fundamental principles may express themselves, their essential thought is the same.

At the inauguration of President Lowell as President of Harvard University, Mr. Bryce was there and gave an address, in which he uttered what I think was the most pregnant sentiment of the celebration: he said: "A university should reflect the spirit of the times, without yielding to it." I take it that we may reflect the spirit of the times in a way that shall not yield the essential freedom of the university.

I don't know how it is in Canada, but we are absolutely free in the United States universities in the matter of holding any heterodox notions we may choose to hold, regarding higher mathematics, or even philosophy. But when we get to subjects such as sociology, political economy, or political science, then some people are somewhat sensitive about what the university should teach. But it is clear that the university must hold itself absolutely free to teach the truth as it sees it throughout the field of politics, of morals, of religion. Only so can the university be a university; only so can it see that it does not yield to the spirit of the times.

While I make this statement thus somewhat dogmatically, I understand perfectly that the spirit in which this work is done must not be that of the advocate; it must not be that of dogmatic certainty. We must realize that of all subjects, everywhere, knowledge is incomplete. No man knows everything about a grain of sand, and no man ever shall know everything about a grain of sand! Therefore it is the function of the university to ever advance towards completion and perfection, without expecting to reach either anywhere. Therefore, while the university professor should be free to teach and investigate, his attitude must be that of the seeker after truth, that of the Judge, and not that of the advocate.

However, it is not these fundamental commonplaces that I am expected to emphasize here to-day; only I thought I ought to say these things as a background from which you should see these branches growing, and therefore that the

fundamental spirit of all universities in these respects, their most essential ideas, are the same and must remain the same.

Gradually it dawned upon some people in the university world, first at Oxford, that it was not sufficient to teach students who came to the doors of the university; that it was not sufficient to advance knowledge; that there was a function of carrying knowledge out to the people. The name of the Oxford University Extension Movement was the name given to it at the time. Now what are the fundamental principles upon which these ideals are based? The advance of knowledge has been greater in the past sixty years than in two thousand years before. Until about 1850 the development of knowledge was so slow that ideas which the people might utilize to their benefit were fairly well assimilated; but during the past sixty years, communication has brought all parts of the world together, discovery has gone in every direction, communication has become instantaneous, and knowledge has far outrun the assimilation of the people. We know enough about agriculture so that if it were only applied in Ontario the agricultural wealth of this Province could be doubled in a decade. We know enough about medicine so that if it were applied infectious and contagious diseases could be eliminated from this city in a generation or less. We know enough about eugenics so that if it were applied the feeble-minded would disappear in a generation, and the insane in a very large proportion. But we don't apply that knowledge.

The time was when it was said that it will do to teach the new knowledge to the boys and girls in the schools. And this, of course, should be done. But since many of you left the schools, a vast portion of this new heritage has accumulated. You have twenty-five or fifty years more to live. And you are but illustrations of the situation throughout this province and the nation of Canada. Therefore it is not enough to teach the new knowledge to the people in the schools; it must be carried out to them everywhere.

It was this situation which gradually led us in Wisconsin some ten years ago to attempt to reorganize this Extension Movement. This Extension Movement began in the lyceum method of instruction. The professors at Oxford went out and spoke to the people, giving perhaps two, four or six lectures upon a subject, and directly after the

lectures there were colloquiums. That was good work to do, and it is continued to the present time. But it was found to be limited in its application and scope. For the most part it was pouring in knowledge upon the recipients and not asking the person to whom this new knowledge was given to use it, to dig it out for himself. It was information, rather than education. And therefore this lyceum method of instruction, while it is performing a brilliant service, and will continue to do so, has failed to accomplish all that was expected when the movement was launched at Oxford some sixty years ago.

Now away from large centres it is very difficult to apply the method because of the expense; and even in large centres it is difficult to maintain. So we took up a movement in the University of Wisconsin some eight or ten years ago for the purpose of emphasizing it upon some different lines, and placing it upon some broader basis. The first line taken up was correspondence work. At the present time, the university has about as many students doing work by correspondence as at the university—somewhere between five and six thousand. When this plan of doing work by correspondence at the university was first broached to an eastern educator, he asked, "What about your ideals? Is it proper to be doing work not in the college or university building?" I replied that we didn't publish their names in the catalogue of the institution, or give them degrees; and we didn't see how it demeaned us, doing any line of work for which we were the best fitted instruments. We thought we could do it without doing violence to anybody's ideals anywhere, or to the proper scope of the university. This advancement we took up not for the work of the elementary school or the secondary school, but we took it up for the benefit of the people not in school who wished to add to their education.

I believe your system of education provides for education in continuation schools, and that some ten or fifteen thousand boys and girls are attending them. But every one of us should be students in a continuation school throughout life. And it is to serve this large purpose that the Extension Movement was formulated.

Our faculty—I don't know how it has been in the University of Toronto—but in the University of Wisconsin, when it was proposed to enter upon this new work, some were con-

servative; some were afraid that the standards would be lowered. We said, however, that no department would be obliged to take up the work unless willing to do so, and that they would not be criticized if they did not. On that basis a few of them took it up. And now opposition to it has entirely disappeared, and practically every department is engaged in the work. And they say the work is well done, as well as in the university. We of course do not accept the work of extension for a degree; only one-half may be done *in absentia*. A great satisfaction is that it has opened the door of opportunity and made an education available to any boy or girl without respect to condition of birth, without respect to his ability to go to college or university.

In the little village of Bloominggrove, eight or ten miles from Madison, a boy lived on a little forty-acre farm; he had his mother and aged grandfather to support, and others. So it was simply impossible for him to get away from the little forty-acre farm. But he was interested in astronomy. He made a telescope and ground the glass for it. And two of the comets discovered that year bear the name of that boy! He took up correspondence in the University of Wisconsin, which fitted him to become an astronomical instrument maker; and now he is making instruments to be sent out to all parts of the United States.

Thus we have this twofold purpose: not only to get knowledge to the people, but also to find a way for the boy or girl of parts, whatever the condition of birth. One of the professors in the University of Wisconsin, who was chairman of the State Commission of Commerce, and is now on the Interstate Commerce Commission, was attracted to the university by correspondence work, and he said he never could have hoped to get an education except that he began that way.

This work takes over many lines. I have not time to more than hint at the various lines in which this work of extension is carried on in Wisconsin. I shall illustrate only a few of them. We have, for instance, a municipal reference department, to answer questions for any municipality in the State regarding which it may ask any question it may desire, for example, about a sewerage system, the forms of charters, types of drainage systems or waterworks, plants of any kind—the information is furnished to them and the best

advice given along that line. And this work is done not with the purpose to get us into politics: for we help a Socialist here, a Democrat there, a Republican somewhere else; and it is carried on in an impersonal way, without regard to who asks the information. All this has led to complete absence of criticism. The department serves as an expert adviser to the municipalities in Wisconsin throughout the State.

Another field is that of debating and public discussion. I don't know how it is in Toronto and Ontario, but the Anglo-Saxons and Norse over in Wisconsin, and the Norwegians and Germans, are so cantankerous, that in every little crossroads community they have a debating society! They used to discuss such questions as these in my youth: "Is George Washington or Abraham Lincoln the greater man?" "Is man's intellect equal to woman's, or *vice versa*?"—perfectly futile questions, which begin nowhere and end nowhere! It seemed to us, however, that here was an opportunity, an educational opportunity, and so burning questions of the day, such as the initiative, the referendum, and the recall, methods of taxation, currency reform, the tariff, all these questions which were before our people, have been taken up by our Extension Department, and a careful syllabus of the arguments on each side was prepared. Each political and social question regarding which you differ has two sides, and there are honest arguments upon each side, and the way we do advance depends upon the balance or arguments between the two. So these arguments are outlined, and little books are prepared, and bunches of pamphlets, each illustrating and giving materials for research upon the subject. So when the Crossroads Debating Society wanted to discuss the tariff, this syllabus went to that society, and with it this bunch of books and pamphlets, and wherever you have a crossroads debating society you have a powerful educational force. Not only are they taking up these questions in the societies that already existed, but there have been organized many more than existed before, and they are discussing these live questions. If we are to have in Wisconsin the initiative, the referendum and the recall, as doubtless we will in the near future, it is high time to get them set seriously thinking upon these questions upon which they will be obliged to pass.

Another work is that of demonstration, that is, sending out demonstrations and travelling exhibitions of various kinds, and holding public institutes. A demonstration of hygiene and sick philanthropy was running for three months in Milwaukee. These means of communication with the people result in very great advancement. A travelling tuberculosis exhibition goes about the State, to any little town which will ask for it and furnish a room in which to place the exhibit, and the co-operation of physicians in this town and others is secured, who go in and give lectures upon the prevention of tuberculosis, the means of elimination of the disease and the conservation of health. The cost is almost nothing, and this method is far more efficient than extensive sanitariums, costing hundreds of thousands of dollars.

Another matter is that of the university rendering expert service to the State. Your president raised the question whether the Legislature were the fathers of the university, or the Legislature were subject to the university. Now this is a tender subject with us, and a tender subject with the Legislature. They don't enjoy intimations of this kind. But I am very glad the point has been raised, because I can illustrate the principle. We carefully refrain from tendering our advice anywhere until we are asked. We don't go down to the committees of the Legislature and frame their bills for them. Professors do not go to the Legislature unless they are asked. But it has been the habit of the Legislature of Wisconsin for the past eight or ten years to think that possibly they don't know by intuition just what should be done in the composition of a complicated bill. Therefore, our Reference Library is in charge of a philosopher, who goes down when he is asked, to give such assistance as he can. As a matter of fact, many bills, and those the most progressive bills, are those in which professors of the university had had a large share. Some professors, when the Public Utilities Bill was drawn up, were down at the Legislature night after night for three months. Similarly when other bills have been under consideration it has been the custom to appoint commissions to make reports. The result is that at the present time there are serving on such commissions over forty men on the instructional staff of the university, doing expert work for the State; and in the same way many other men are doing work incidentally.

When the Public Utilities Commission was established, it was believed by the railroads that they would be robbed. It was believed by them that this new commission would take away their property. But the Government appointed a scientific commission of three men, an able statistician, an able lawyer from the centre of the State, and one man from the university as chairman. He was in Germany at the time, but was cabled for and came back. The presidents of the railroads told me that they favoured the commission; that neither side would go back to the old plan, when if either side held up bills they would be defeated by questionable methods, to the deep displeasing of the people. Now we have peace, because we have the rule of reason applying to both parties.

In addition to this Public Utilities Commission, we have a Taxation Commission, and the last is an Industrial Commission, the bill for which was very largely constructed by Professor John R. Commons, of the university. After this bill passed the Legislature, the Government asked him to become a member of the commission, and asked a live business man to serve as chairman for two years, who got it up on its feet. As is the usual practice, the bill simply laid down that there should be reasonable conditions of safety and sanitation, leaving to the commission the working out of the details under these broad principles of law. The result was deep satisfaction on the part of both workingmen and employers. It is sometimes said that professors are not practical. Professor Commons did not work out these details out of his own head. He found out by talking with manufacturers and labourers what was done and what was wanted. He would ask, "What are you doing here, in this shop? Is this reasonable?" And he practically got both sides to agree upon reasonable requirements which should be enforced. After the commission had been in operation two years, various lines of amendment were suggested, which were practically based on suggestions by both sides. And now, having done that constructive work, the professor, having decided that a professor cannot possibly spend \$5,000 a year, came back to the university and a salary of \$3,500, to carry on his work of instruction and research.

We estimated last year that we reached, directly and indirectly, some two hundred thousand people in the State of Wisconsin through our various lines of the Extension Move-

ment. But President Falconer knows that this was not done without money. When this Extension Movement began, five or six years ago, when I had this rainbow vision first of what might be accomplished, we were delighted at succeeding in getting from the Legislature the sum of \$7,500 for the first two or three years. Then we went and asked the Legislature for \$20,000 for this work for the following year; and they voted it. The next year we asked them for \$50,000 for the first year of the biennium; and another \$50,000 for the second year; and they gave it. The next biennium we told them we could not do this work under one centre, and must have more centres established; we asked for \$100,000 and \$125,000 for the two years; and they granted it. And this last year we went back with our request for the usual implement of \$25,000; and they voted it. This, of course you understand, is in addition to the agricultural extension—I am not speaking of the agriculture, to which they gave \$60,000 more. That, of course, is such work as is carried on by the Province of Ontario from Guelph.

Now in voting these increased sums of money from the State, the Legislature has not in any way crippled the university, or lessened its growth in other directions; it has indeed increased our growth and spread it in other directions. For if you do for the people what they want done, then they have confidence that you may have sound reasons for wanting to spend money in some other direction. For, in addition to this appropriation for this extension work, they give for general university purposes about \$1,200,000 a year, and have voted for buildings during the next two years \$1,000,000.

While, therefore, this University Extension Movement was thus actuated at the inception by no other purpose but to perform the larger service, we have found that at the same time it was wise simply from our own point of view. Of course, a university nowhere exists for itself; its existence is justified only as it performs service to the people. While this service of the advancement of knowledge is immeasurable in its results, in educating our own men and women and sending them all over the Commonwealth, so men of unlimited breadth of view do so much for the material wealth of the State, that this has been increased many fold in comparison with the contributions made by the State to the in-

stitution. Therefore, when you increase the resources of the university in these things, it will further grow. Thus, without taking anything from it, you are giving to it, adding to the intellectual, moral and spiritual growth of the Commonwealth, which, after all, must ever remain the prime, fundamental and chief purpose of the university. We create things for men and women, and if in creating things we forget men and women we make a profound mistake.

This principle of carrying knowledge to the people, this principle of finding a way for the boy and girl of parts, is fully developed in Ward's Applied Sociology, a book of some two hundred pages or more. He shews that the greatest loss of a nation or a province is its loss of talent. You know not all the ability is born in your palatial residence sections of the city. You know it is quite as likely to be found in the boy placed among your manufactories or close to your docks. Therefore, it is your duty to build a system of education which will find a way for the boy and girl.

It is proposed sometimes to take all property and have an equal distribution of wealth. That method has never met with the approval of the majority of people, of Anglo-Saxons, anywhere; I doubt if it ever will. That is not the fundamental principle of democracy. But so long as you have an institution, so long as you have a system of education, such that the boy or girl of parts can find a way, so long you maintain the essentials of democracy. And just the moment you have a school system and the development of social institutions in such a way that this is not possible, then, whatever your forms, they may be the forms of democracy, but the real democracy has ceased to exist.

When elementary education was democratized in the States, it was regarded as a great achievement—as far as we could possibly go. Then later, in the Middle West, people were not satisfied till secondary schools were built up, and it was recognized as the proper function of Government to support the secondary schools. The east regarded this as a great innovation, an unwarranted waste of public money. But it extended through the middle west, and to the west, and to the south. Still later came the idea of democratizing university education. This was deemed highly socialistic—"taking my property to give a higher university education to some other man's boy!" But whatever theories there were about this, there were no funds in the middle

west from private sources to build up a university; yet there came ever stronger pressure from the boys and girls who wanted a university education. And a state university was the result, such as you have in Ontario. That has extended throughout the country, with the exception of two or three eastern states, where great endowed universities are performing substantially the same function.

In short, it has become our ideal not only to democratize primary and secondary education, but to democratize higher education. And if this can be accomplished on the North American continent, it will be a new thing in the world. We know that German universities, while state universities, are largely available only to the well-to-do classes. This same is true to a large extent of the ancient and honourable Universities of Oxford and Cambridge, which have done so much to make that great nation of such tremendous world power. But only recently has England, by the development of her municipal universities, realized this responsibility. I was asked a question by Lord Morley when in England two or three years ago, why it seemed that England was losing ground in comparison with Germany. I replied: "You will excuse my profession as a pedagogue, but we in America think it is because you do not recognize higher university education as a public function."

If you in Ontario have good primary schools, and secondary schools equal to any, and a system of continuation schools where the boys and girls are obliged to go who are in shops, and a university covering all fields of knowledge for which there is sufficient demand, the Province of Ontario will move forward, materially, intellectually, and spiritually, with a speed vastly greater than even the amazing acceleration of the past.

LORD ALVERSTONE.

The announcement has been made that Lord Alverstone the Lord Chief Justice of England, who has for some time past been suffering from severe illness, has sent in his resignation of his high office, and Sir Rufus Isaacs has been appointed his successor. Lord Alverstone's reputation as a lawyer both at the Bar and on the Bench has been deservedly high, and he will carry with him the sincere respect and good wishes of a large circle of friends. For us in Canada his name will always be associated with the Alaska award, and he will no doubt be remembered by many as one who sacrificed the interests of this country in order to effect a settlement of a troublesome question; but we venture to think the verdict of posterity will be quite the reverse, and that succeeding generations will find that he did nothing of the kind, but on the contrary, by his decision in that case, came to a reasonably just and proper conclusion. That his conclusion was perfectly right and in accordance both with international law and the evidence we think is reasonably certain, though perhaps his alleged failure to communicate to the Canadian Commissioners his change of view as to the proper course of the Portland Canal as an international boundary, may not unfairly be the subject of criticism. But those who have criticized the merits of the decision find it convenient to ignore a very important and indisputable fact, viz., that *the only British plan purporting to shew the course of the Portland Canal in detail was one prepared by officers of the British Admiralty in 1868 and is numbered 23, and this plan shews the course of the canal to be exactly as Lord Alverstone determined it.*

His decision was unfortunately the subject of misunderstanding. There was first the personal element arising from his alleged change of opinion without communicating the fact to the Canadian Commissioners—which aroused a feeling of resentment in the latter at having been slighted, and, as they thought, to some extent betrayed. But a little calm discussion would, we feel confident, have sufficed to convince any reasonable man, that the change of opinion was perfectly justified, and involved no unreasonable concession to

the claims of the United States Government, and was not in any sense a compromise.

Unfortunately the attitude assumed by the Canadian Commissioners precluded any calm discussion. They jumped to the conclusion that the rights of Canada had been sacrificed, and they were in no humour to listen to any explanations and in the circumstances, doubtless none were given.

But looking back at the matter at this distance of time, and with a sincere desire to understand the merits of the case, there seems to be really no difficulty in concluding that so far from Lord Alverstone having in any way acted capriciously, or sacrificed the interests of Canada, he really gave a perfectly just and reasonable judgment.

The only point in which his conclusion has ever been seriously attacked was his delimitation of the Portland Canal. This is an arm or inlet of the sea about 100 miles long; it is not bounded on its southeasterly side by a continuous strip of land, but for a considerable part of its course and particularly on its southeasterly side, it is bounded by a series of islands; between these islands there are outlets from the canal to the ocean. The United States' counsel claimed that the canal should be treated as a river and that the widest of these outlets, which they claimed was the chief channel, should be selected as the course of the canal, as it was an international boundary. This, if acceded to, would have made the outlet north of two large islands, Wales and Pearse, which would thus have been ceded to be American territory. This was claimed as justified by what is called the doctrine of the *Thalweg*. This doctrine as applied to rivers forming international boundaries, carries the boundary through the main in preference to shallower channels of the stream. This doctrine is a mere convention, but it is one that commends itself to common sense. To have applied it, however, as the Americans contended for, would have been unreasonable, as it would practically have almost entirely altered the course of what was known as "the Portland Canal." But though this doctrine was manifestly inapplicable north of Wales and Pearse Islands, as Lord Alverstone held, it seemed perfectly reasonable to apply it to the exit south of those two islands. There the choice was between a narrow exit, comparatively shallow and only about a quarter of a mile wide, and the deeper channel called the Tongass passage. The choice of the latter seems really irresistible, when the only map pro-

duced purporting to shew the Portland Canal in any detail, exhibits it as having its exit to the ocean at the Tongass passage, the existence of the narrow exit being merely indicated by a dotted line.

If any lawyer were asked to adjudicate the claims of private persons in such circumstances, we think the fact that one of the litigants before any contention had arisen had mapped out his boundary line in a particular way, would be regarded as pretty strong evidence against his contention that that was not its true course. Here the Admiralty map may have had no legal binding force on Great Britain, but it certainly had a certain moral weight, and in the absence of any clear evidence to the contrary, a Judge could never be said to have disregarded his duty, who should say: "Your own officers have surveyed and delimited this boundary; what they have done I will assume in the absence of any overwhelming evidence to the contrary, is correct, and I settle your boundary as your own officers settled it." And that is exactly what Lord Alverstone appears to have done.

Those who are old enough to remember the arbitration respecting the British Columbia boundary, may recollect that the same principle was applied there, and the line carried through the deepest channel to the west instead of the east of S. Juan Island, and in the St. Lawrence and in the Great Lakes, the same principle has been applied in delimiting the international boundary. This being the case, where was there any injustice to Canada in applying such a generally recognized principle to this particular boundary?

A BAR ASSOCIATION.

THE ADVANTAGE IT WOULD OFFER TO THE LEGAL PROFESSION IN CANADA.

In the early part of the month of September of the present year, circumstances gave me an opportunity to have a conversation with Dr. Chas. Morse, registrar of the Exchequer Court of Canada. In the words of Lewis Carroll we "spoke about many things." If you should wish me to generalize I will say this much: The topic of our discussion was of an extensive range, and the "peaks" thereof were civics, idealism and upon legal efficiency! The present remarks concern the last of this trilogy—legal efficiency!

We had this "talk" in the registrar's office which as you are aware is situated in Canada's "famous palace of Justice" at Ottawa. (I wonder what Sir Gilbert Parker would say if he heard about my architectural criticism of the place! For Canada's sake I hope the Government will let the people of this country have a real Palace of Justice.) So you could see that the inspiration to speak about legal matters was all that could be expected.

However, I will not tell you that we considered the problems, and the "double examination" system of graduating law students, as for example, prevails in the province of Quebec, and other allied matters; but I will tell you that Dr. Morse at the time suggested a new feature in the corporate life of the lawyers and barristers of Canada, which I am glad to see is being advocated also by the former professor of Civil Law at McGill University—the Hon. Charles Doherty. This suggestion is that the legal fraternity of our Dominion, from far-off Yukon to Prince Edward Island (and possibly Newfoundland) should seek ways and means looking towards the formation of a "Canadian Bar Association."

This is a matter which must have been the dream of many past statesmen and advocates in our country, and one marvels that it was not consummated. Still one should not criticize such a state of affairs too severely, for ten years ago the need of a "Canadian Bar Association" was not so imminent and apparent as it is to-day. In the last decade the agricultural, industrial and especially the commercial progress of the Dominion have been so perceptibly rapid that it has placed the attorney-at-law in a relatively more su-

perior position in the scale of gradation of professional life of our land than perhaps any of the other learned vocations—with the possible exception of the civil engineer. I believe that this statement is fair and incontestable. I believe, also, that the members of the various provincial bar associations or law societies feel that “now,” since the matter is again broached, the occasion is ripe to test the opinion of the lawyers, to see whether we in Canada, cannot, with profit to the country at large, follow the lead of the American and European Bar Associations and formulate an equitable constitution to embrace all the Bar Associations of the Dominion into one parent federation with utmost autonomy to the constituent units thereof.

The good to be derived therefrom is known and conceded by those who have watched the work of other national bar associations. No critic is likely to arise to state that there is evil as a possible resultant lurking in the path of such a movement.

Of course you will note that I hold a “brief” in favour of the formation of a federated combination of the bar societies of the Dominion; and my friend, Dr. Morse, will surely bear me out by word and deed in this publicity to the cause now before us. But lest one might be too self-convinced let us advert to some of the objections that are within the bounds of possibility.

What will the public of Canada and the labour unions have to say about it? At first sight a “Mark Twain” might answer: “well, it’s none of their business!” But this is harsh, and a kindlier answer is requisite, for if there is anyone in this country who should be interested in the doings of the legal profession of Canada it is certainly the “man in the street.” Ostensibly the institution of lawyers and the Courts of law is to dole out justice to all, so that mankind may live in society equitably and happily, and as to such traditions the populace is mightily interested. So that the workingmen and their leaders should be informed from the outset that the “Canadian Bar Association” on principles of social liberty as well as civil liberty seeks incorporation for the good of the greatest number; and that the combination of the several law societies is not to be a tool in the hands of the capitalist against any other “imaginary” foe or class of the body politic of our country, but that the association is, ethically speaking, a utilitarian organization

striving for the peace, progress and welfare of all inhabitants of the Dominion.

But some staunch patriot who has been reading Christie, Kingsford, Lareau, Demontigny, Garneau or, if you like, Constable's History of Canada under the two regimes, will proffer the objection that some members of the French-Canadian section of the Quebec Bar Association will object to joining hands with the "Canadian Bar Association" for fear that the rights safe-guarded by the Quebec Act of 1774 may be jeopardized, and because of the possible assimilation and engrafting of the English Law into the Code Law of French customary origin so dearly cherished by French-Canadian and Anglo-Canadian jurists in our province. In other words, the problem of "*Je me souviens*" artists.

To this objection the bas reliefs to be placed upon the monument to be erected to the codifier of our Quebec law—Sir Georges Etienne Cartier—is a sufficient reply. French-Canadian lawyers are always ready to listen to amendments to the laws, and the legislators are quite prepared to carry them out if they are equitable and more congenial to the spirit of our law, regardless whether the amendment comes from the law of California, Louisiana, the German Empire, England or France. But fortified as we are in Quebec in the citadel of the Contume de Paris and Institute of Justinian, and with the ethereal essence of the Roman Law hovering in the midst of our public forums, I have no fear of this objection. I know full well that the French-Canadian jurists would not in all seriousness raise such an objection to allying themselves with the rest of their confreres in the other provinces of the Dominion. Aside from the foregoing particularized criticism, Quebec advocates appreciate too highly the incalculable knowledge and experience that they can derive from being a member of a "Canadian Bar Association," where the great branches of the law of the realm such as International Law, both public and private, systems of Legal Education, Commercial Law, the Criminal Law, and public and constitutional, and, if you will, Imperial Law will be studied and debated by the master minds of the legal societies of our herculean Dominion.

In a final analysis, I can see no material harm for Quebec lawyers knowing more about the English Common Law and the geniuses that have interpreted it throughout the ages,

and I can discern nothing but an inestimable intellectual gain to be derived by the barristers of the English Law provinces from a closer knowledge of the Quebec Code, and of its origin and of the spirit of the Roman Law.

I am glad to avail myself of this juncture in a busy student's daily routine to pen some words in support of the formation of a "Canadian Bar Association," and in doing so I have presented the two sides of the medal. Publicity and education will amicably level differences, if any of a serious nature exist. I hope that others will take up the symposium where I have left it, and carry the matter to some tangible result. In the meantime the batonniers of the respective bar associations of Canada should get into correspondence with one another to see if there are any obstacles in the way of immediate organization, and, if not, during the new year or short vacation to meet together and formally draw up plans for the founding of a Canadian Bar Association, worthy of its name, worthy of the great trust that is to be put into its hands by the people of Canada; and worthy to be a beacon light blazing the way which leads to the highest influences of civilization—the path to eternal and sublime justice.

A. JACOB LIVINSON.

Faculty of Law, McGill University, Montreal, October 7th, 1913.

EDITORIAL.

Our contemporary, the *London (England) Law Journal*, in the last issue publishes a special Law Society Number in which the relation between the Law Society and the University is ably discussed. As the question is of vital importance not only in Ontario but throughout the whole Dominion of Canada, where new universities and law schools have been recently established, we have taken the liberty of quoting the articles in question *verbatim*. In addition, the recent changes due to the retirement of Lord Alverstone and the appointment of his successor, entailing as it does various changes in the office of the Solicitor-General and Attorney-General makes the number a particularly interesting one and our debt to our contemporary for drawing so largely from this interesting number is a very great one.

We publish in this issue the minority opinions of H. A. Powell, Esq., K.C., and C. A. Magrath, who dissented from the finding of their confreres of the International Joint Commission in an application for approval of what is known as Kettle Falls Dam. The application refers to article 3 of the treaty between the United States and Great Britain dated the 5th of May, 1910, the full text of which article is given in the opinion of the two commissioners above mentioned, and also the various other sections which affected the question, in addition to which the opinion of the majority is also appended, together with the order dismissing the application.

A careful reading of the two reports leads one to believe that the true finding was that of the minority, and had the commission been composed of Judges accustomed to the interpretation of the statutes there is little doubt but that the finding in the matter would have been reversed.

Owing to the international importance of the question it will undoubtedly be of great interest to our readers to have the full text of both findings.

It is perhaps not surprising that during the present period of growth and expansion in Canada a number of anoma-

lies should exist. The profession of law, which is after all ultra-conservative, is not exempt from being in this category. A student enters the law school from one of the great universities or as a matriculant, for a specified time, is duly called to the Bar and enrolled as a solicitor for the province in which he has obtained his legal education, and although it is the boast of Canadians that the federal system has its best exemplification in the Canadian constitution, yet the barrister practising in Ontario cannot practice in British Columbia or any other of the western provinces, nor in fact in any other province save the one to the Bar of which he has been called. It is true an excuse may be found in the case of the Province of Quebec, where the civil law is different from that of the other provinces, but even the laws of the Province of Quebec are not so difficult nor intricate that under a general system of legal education a call to the Bar in any one province should not entitle the young barrister to plead in any other province, not even excepting Quebec.

Visitors to Britain very often experience great annoyance when travelling from Scotland to England or Ireland, and *vice versa*, in finding that with the exception of the bank notes issued by the Banks of England and Ireland, the notes of any other bank are subject to discount, which, from the Canadian or American point of view, is an absurdity. Is it not equally absurd that a barrister of one province should not be permitted to practice at the Bar of another?

An endeavour will be made to obtain the opinions of a number of distinguished gentlemen with the object of doing away with such an anomaly and making it possible that the barrister in Ontario, or British Columbia, or Prince Edward Island, or Quebec, should be entitled to plead at the Bar of any of the other provinces as well as his own.

The following announcement has been issued by the president of the Ontario Bar Association, and as every member of the profession will appreciate the work done by the Association in procuring a revision of the tariff, it is to be hoped that advantage will be taken to send without delay an application for membership:

Toronto, Nov. 8th, 1913.

Dear Sir:—The annual meeting of the association will be held in Toronto on Monday and Tuesday, December 29th and 30th. It is the intention of the association to invite the president of the American Bar Association, William H. Taft (former President of the United States), to deliver an address and to be the guest of honour at the banquet on Monday evening.

In the past year the council of the association took an active part in the revision of the Tariff and Rules of Practice. It urged upon the Government the desirability of appointing a Judge to undertake the work of revision, and the Honourable Mr. Justice Middleton was appointed. Special counsel were then engaged by the association to prepare Supreme Court, County Court, and Surrogate Court tariffs. Upon their suggestion a block system of taxation was submitted and was to a large extent adopted in the new tariff which has recently come into effect.

Members of the council devoted much time to the work. A special committee was appointed and attended on Mr. Justice Middleton from time to time as the new rules and tariff were in course of preparation and conveyed to him the views of the profession on various matters which are now satisfactorily dealt with in the new rules.

A proposal has recently been made that the duty of the Committee on Legal Ethics be extended. Heretofore that committee has only studied the subject of legal ethics and reported at the annual meeting. It is now suggested that the committee should answer inquiries from members of the profession on points arising in regard to professional ethics or etiquette. This suggestion will be considered at the annual meeting.

A special effort is now being made to have every lawyer in the province become a member of the association and to have members who have not remitted for 1913 pay up now.

If you are not a member of the association, or if your fees for this year have not been paid please sign the enclosed application and mail it with one dollar in the enclosed envelope.

Yours faithfully,

M. H. LUDWIG,

President.

PERSONAL.

THE NEW LORD CHIEF JUSTICE.

The appointment of Sir Rufus Isaacs as Lord Chief Justice of England has been generally acclaimed as an act of justice due to his distinguished talents and a well-deserved recognition of his commanding claims to high judicial office. It is admitted on all hands that he possesses all the natural and acquired faculties which go to the making of great Chief Justices, and there are few who would withhold from him the proud title to preferment—*omnium consensu capax imperii*. But to the profession the elevation of this plain merchant's son, born of an ancient but alien race, to the seat of Mansfield, of Ellenborough, and of Cockburn, is specially welcome for the proof it affords that of all careers that of the Bar of England is the one most open to all the talents. The new Lord Chief Justice may be depended upon not only, according to his oath, to "do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will," but to apply his great administrative powers to the speeding of justice. His aim, if we mistake not, will be to secure that some approach may be made under his chiefship to the ideal, which he himself has proclaimed, that the Courts shall be always open and ready to settle disputes and remedy grievances whenever, and as soon as, they are presented by any of the King's subjects.

THE NEW LAW OFFICERS.

Sir John Simon, who has, in the natural course of events, been promoted from the office of Solicitor-General to the Attorney-Generalship, possesses a capacious and cultured mind and a strong and attractive personality which will enable him to fill with distinction, at the almost unprecedentedly early age of forty, the high position of leader of the English Bar. He fills so great a place in Parliamentary life that his inclusion in the Cabinet, in accordance with the precedent created in the case of Sir Rufus Isaacs, is difficult to criticize, but we still hope that a practice which, by emphasizing the political character of the Attorney-General's

office, tends to diminish its professional prestige will not be continued. But there is no member of the profession who does not cordially congratulate Sir John Simon upon attaining the position of leader of the Bar, which he is so eminently qualified to fill. In accordance with expectation, he is succeeded in the Solicitor-Generalship by Mr. Buckmaster, who has won a great reputation at the Chancery Bar, and who is justly regarded in the House of Commons as an effective speaker, whose political zeal never encroaches upon his fair-mindedness. Not since the late Sir John Rigby ceased to be Attorney-General nineteen years ago has a Chancery lawyer been a Law Officer. It is a very distinguished list of Law Officers who have come from the Chancery Bar in modern times, including, as it does, the names of Cairns, Roundell Palmer, Jesel, and Davey. The new Solicitor-General will be no unworthy addition to the number.

THE LATE SIR ALBERT DE RUTZEN.

General regret will be felt at the death of the late Chief Magistrate of London only a few months after his retirement from office, so that he has not long enjoyed the leisure which he had earned so well by his forty years of magisterial service. He proved in his own person—for he was appointed to the chief magistracy when he was already verging on seventy—that a Judge who loves his work may well render his best service to the community when, in other vocations, men think of retirement. His native kindliness of heart and his sportsmanlike character counted for much in the successful performance of his duties; and from the beginning of his career, when he handled the Merthyr Tydfil rioters with such ability as to win the general praise, to the close of it, when he mitigated the violence even of the militant suffragists, he displayed those qualities which best befit the magistrate.

M. L. Bell was admitted to the Bar of Alberta after being presented to the Judge, by W. A. Begg, K.C., president of the Medicine Hat Bar Association. Mr. Bell has recently graduated from the University of Manitoba, where he re-

ceived high honours in his class. He will become a member of the firm of Davidson and Bell, joining Mr. G. T. Davidson, the well-known solicitor, of Medicine Hat.

Frederick W. Monro, an old and well-known barrister of Toronto, died at his home, 84 Beverley street, after a lengthy illness.

Mr. Monro was born in Scotland and came to Toronto with his parents when a boy. His brother, the late Thomas Monro, was the engineer in charge of the Welland Canal. Mr. Monro was educated in Toronto, and practised law in this city for over thirty-five years. For six years he lived in Chicago, being connected with the Chicago Title & Trusts Company. Five years ago he severed his connection with that company and returned to Toronto.

Mrs. Monro survives.

Robert Ramsey Evans, a solicitor formerly practising in Ontario, was sworn in to practice in the Province of Alberta. Mr. Evans is a member of the law firm of McCarty and Evans of Medicine Hat.

Mr. W. F. Gurd, of Cranbrook, B.C., has removed to Vancouver. Mr. T. T. Mecredy, formerly of Vancouver, has taken over Mr. Gurd's Cranbrook practice.

Mr. W. R. Smythe, K.C., begs to announce that he has removed his office from 70 Victoria street, to Room 11, Standard Stock Exchange Building, 56 King street west, Toronto.

Messrs. Aitken & Gilchrist, barristers-at-law, beg to announce the retirement of Mr. Charles A. Wright from the firm of Messrs. Aitken, Wright & Gilchrist, barristers-at-law, Calgary. Mr. H. L. O'Rourke, B.A., barrister-at-law, of Osgoode Hall, Toronto, has become associated with the firm, which will continue its practice of law under the firm name of Aitken, Gilchrist & O'Rourke, at Suites 3 and 4, Alberta Block, southwest corner of Eighth avenue and First street west, Calgary, Alberta.

J. U. Vincent, K.C., has been appointed secretary of the Federal Department of Inland Revenue and Assistant Deputy of that Department. The new official is a member of the

well-known law firm of Vincent & Seguin, of Ottawa, and has been an active figure in the local political arena for some years. He contested Russell against Hon. Charles Murphy in the last Federal election, but was defeated.

Mr. Vincent is a man of energy and decided views on public questions and has been conspicuous for many years as a leader of a section of the French-Canadians. He has been extremely active in promoting what he believes to be the rights of his fellow countrymen in matters educational and national, and also has been a conspicuous figure municipally and fraternally.

He is clear-headed and fearless in debate and an excellent public speaker, and a lawyer of good ability.

He was born in Ottawa in 1872 and educated there, being a graduate of Ottawa University, with honours in philosophy. He subsequently studied law at Osgoode Hall, Toronto, and was called to the Ontario Bar in 1897. He was created a King's Counsellor in 1910. He has practiced his profession with success in the capital ever since graduation and rapidly came to the front as a leader among the French-Canadians of the capital. He has been president of the Monument National, and of the Ste. Jean Baptiste Society, and of the L'Union Canadian of Ontario. He has been a vice-president of the Ottawa branch of the Over-Seas Club and Chief Ranger of Court 304, C. O. F., and he has also sat at the Aldermanic Board and been a License Commissioner for Ottawa.

E. Fabre Surveyer, K.C., Charles G. Ogden, B.C.L. (formerly associated with the legal department of the Grand Trunk Railway Company), Paul Surveyer, LL.B., and Humbert Mariotti, B.C.L., announce the formation of the law firm of Surveyer, Ogden & Mariotti, with offices in the Dominion Express Building, 145 St. James street, Montreal.

Mr. G. C. Thomson, Barrister, Swift Current, Sask., has opened an office at Maple Creek, Sask. Mr. Thomson continues to practice at Swift Current, where he is Stipendiary Magistrate. The Maple Creek office will be under the management of Mr. James MacLagan Wedderburn, solicitor, of Scotland, who was for long in the office of Messrs. Munson, Allan & Co., Winnipeg.

Mr. Neil MacKinnon, who for the past 15 years has been with Messrs. William Garland & Co., Portage la Prairie,

for a number of years as accountant, has decided to study law, and about the first of the year will enter the law office of his brother, Mr. J. P. MacKinnon, who is a barrister at Macgregor, where he has been practising for some years very successfully. Mr. Neil MacKinnon attended the Collegiate Institute in Portage and has grown up with the city, enjoying a large circle of friends there. His brother, Dr. A. P. MacKinnon, is one of the well-known physicians of Portage.

All the members of the Bench, the counsel of the Bar, and the elite of the Quebec barristers greeted Right Hon. R. L. Borden on October 23rd, when he was presented with eloquent addresses by Chief Justice Lemieux and Battonier, E. Belleau. It was an unusual demonstration, as the Bench refrains from any such manifestations, but the Chief Justice in his remarks said the French lawyers of Quebec never had any opportunity to express their admiration for the sound and brilliant confrere they have in the person of the Prime Minister.

The recipient of this rare testimony, who was seated to the right of the Chief Justice, answered to these compliments in a happy manner, referring to the recent convention of the American barristers in Montreal, and to the noble spirit which unites all the members of the order to which he is proud to belong.

Hon. L. P. Pelletier, who is himself one of Quebec's famous lawyers, was present and received his share of regards from the Chief Justice.

Previous to this demonstration Mr. Borden had had a busy morning inspecting the works and the plans of the Battlefield Commission.

An enthusiastic meeting of the Law Students' Hockey Club of Winnipeg, was held in the offices of Hudson, Ormond and Marlatt recently. Bert Andrews, in the absence of the President, occupied the chair. After the report of the Secretary-Treasurer had been read and adopted, the election of officers was proceeded with and resulted as follows:—

Patrons—A. J. Andrews, K.C.; I. Pitblado, K.C.; J. A. M. Aikins, K.C.; R. M. Dennistoun, K.C.; E. W. Marlatt.
Hon. President—W. P. Filmore.

President—J. E. Adamson.

Vice-President—A. H. J. Andrews.

Secretary-Treasurer—R. McN. Pearson.

Captain—W. M. Noble.

Committee—E. A. Dunfield, Herb. Adamson, E. H. E. Matheson.

Delegates to the Inter-Collegiate meeting—W. M. Noble and M. H. Garten.

A hearty vote of thanks to R. Cole, last year's energetic manager, and J. K. Morton, for the interest taken and efforts made by them during the last season, was passed.

A spirit of optimism prevailed throughout the meeting, and it was the general opinion of those present that the embryo lawyers would win the Campbell cup, emblematic of the Senior Inter-Collegiate championship, for the third year in succession, and thereby make it their permanent possession. Most of last year's team will be unavailable this season, but a sterling player has been gained in Herb. Adamson, and there is no dearth of material with which to round out a fast sextette. Bill Noble has already captained one championship law team and his experience is expected to count. The feature of the Inter-Collegiate hockey series this year will be the attempt of Law to win their third straight championship, thereby becoming permanent holders of the cup. No other club has ever had so strong a chance. Both St. John's and Wesley have had two straight wins to their credit, but in each case it was a very weak team which was entered in the third season when another championship would have given the trophy a resting place.

Judge Vance has disposed of his law business at Shelburne and office fittings to James Wallace, barrister and solicitor, of Woodbridge and Toronto. Mr. Wallace is a son of the late Hon. N. Clarke Wallace, of Woodbridge, and was formerly of the firm of Lucas, Raney & Wallace, of Markdale.

The marriage took place on October 28th, of Miss Hannah Margaret Fairlie, daughter of Rev. John and Mrs. Fairlie, Kingston, Ontario, and George Bligh O'Connor, K.C., of Edmonton.

His Honour Judge Wood, recently appointed District Court Judge for the Weyburn district, took his seat for the

first time at the Small Debt Court. He received the congratulations of the Bar Association. During the sitting his Honour disapproved of allowing counsel fee in small debt cases by refusing two applications for same. He also expressed his disapproval of law students pleading as counsel by saying that such practice was strictly against the rules.

Mr. Justice Dunlop recently handed down judgment ordering the liquidator of La Compagnie d'Assurance Mutuelle Contre le Feu du Canada to collect from three local law firms amounts which had been collocated as privileged claims. The Court ordered that they be placed in the class of ordinary claims. The amounts had been paid by the liquidator as privileged claims on the score of counsel fees for the attorneys, Messrs. Cordeau and Bissonnette, \$1,172.53; Geoffrion and Cusson, \$900; Pelletier and Pelletier, \$864.50. They were contested by Messrs. Beaudry and Beaudry, and J. A. Bernard.

Mr. Justice Clute, who has been seriously ill for some time with an intestinal trouble, was operated on at the Wellesley Hospital Oct. 17th. He stood the operation well, and at a late hour was resting easily, and his condition was as favourable as his medical attendants could hope for.

W. Oswald Smyth, received notice recently confirming his appointment as Judge of District Court of Swift Current. He received his early education in that city, and his high school and university courses in Montreal High School and McGill University. He graduated in Arts in 1895, and in law in 1897 with first-class honours, and carried off the Elizabeth Torrans gold medal for having secured the highest marks obtainable. He practised law in Montreal from 1897 until 1905 as a member of the firm of Cruickshank and Smyth. In the spring of 1905 he came West and located in Swift Current and has resided there ever since, and is therefore one of the old timers of that city. He applied for the incorporation of the town and was its solicitor until last year when he resigned.

Mr. Smyth is eminently suited to do honour to the high appointment he has received; his long experience in his profession and broadness of mind, which will enable him

to mingle mercy with justice, making him peculiarly fitted to fill the position of Judge.

The examination of students at law for attorney opened at Fredericton with Dr. T. C. Allen and Dr. J. D. Phinney of that city, and Mr. J. B. M. Baxter, of St. John, as examiners. Applicants for admission as students who hold a degree of bachelor of arts are admitted without examination, and graduates of King's College Law School, St. John, are admitted as attorneys without examination.

At a meeting of the examiners last evening it was decided to allow Miss Frances Fish, of Newcastle, the only lady applicant, to be entered. Miss Fish is the first lady to apply since Miss Mabel French, of St. John, was admitted some years ago. She is a graduate of the U. N. D. with a B. A. degree, having graduated in 1910 and is now engaged as a school teacher at Campbellton.

Frank Ford, K.C., of Edmonton, at Osgoode Hall, Oct. 24th, presented his patent-askings counsel and was called within the bar by Sir William Meredith. Mr. Ford went west to become deputy attorney-general of Saskatchewan.

W. O. Stewart, the blind lawyer of Lancaster, died very suddenly at his home there. He had been about his office as usual the day before. Mr. Stewart studied law in Toronto, being blind before he enrolled as a student. He was born in Lancaster fifty-two years ago. He leaves a widow and six children.

At a meeting held in the lecture room of the College of Law, in the Canada building, Saskatoon, the first student association of the new faculty was organized recently. By the constitution which was approved the organization was thrown open only to articulated students in the city and to those taking the full course leading to a degree of law in the college.

Nominations for officers were made and the elections will take place at a later date. George A. Ferguson and D. C. Kyle were nominated as presidents, H. E. Keown and J. R. McDonald as vice presidents, F. C. Little, C. A. Scott and W. H. Holman for financial secretary, as convenor of the athletic committee, J. E. McDermid, F. H. Bailey, G. M. Grant.

J. R. McDonald, W. E. Lloyd and W. H. Holman were appointed representatives of the college of law on the students' representative council of the university.

The Judges of the Quebec Superior Court are dissatisfied with their present salaries, which are now \$7,000 for Judges residing in Quebec and \$5,000 for those residing in rural districts. They will request the Minister of Justice to increase their salaries to \$9,000 for Quebec Judges and \$7,000 for rural Judges, claiming that the cost of living has increased for them as for any other mortal.

Such is the decision taken recently at a meeting of the Judges of the whole region of Quebec. The rural Judges also ask permission to reside in cities, as social relations in their districts may sometimes render their situation very uneasy.

W. J. Cooper, K.C., of Portage la Prairie, one of the best known lawyers in central Manitoba, died there recently, aged about 52 years. He had been ill only a short time, and was a resident of Portage for thirty years. For a time he was District Registrar, retiring later to resume his practice. He was a partner of Arthur Meighen, present Solicitor-General of Canada, in the firm of Cooper & Meighen. He was a leading Conservative, and opposed Hon. Robert Watson for a seat in the local House in 1891, being defeated by a narrow majority.

The latest issue of the Saskatchewan Gazette gives the following list of new justices of the peace:—James Sinclair Cosgrove, of Lancer; William Wallace Muir, of Moose Jaw; Charles Marshall Mullin, of Cactus; Harold Fares Noble, of Regina; James Alexander Ratcliffe, of Regina; William Roy Shepherdson, of Pennant; Alexander Stronach, of Regina; John William Winn, of Baring; Donald Alexander McDonald, of Girvin; Robert Thistlewaite McLeod, of Kindersley; William H. Montgomery, of Moose Jaw.

Ralph C. Burns, B.A., LL.B., and John S. Mayor, B.A., B.C.L., two young attorneys who have already made their mark, both in Calgary and Bassano, where they have had an office for the past two years, have opened a suite of offices in the Alexander block, Calgary. Mr. Burns has been connected with the well-known firm of Lent, Jones and MacKay

for some time, in addition to his interests in the "dam city," and has been one of the most popular young legal lights. Both young men are natives of New Brunswick, and former residents of that province will unite in wishing the new firm the best kind of success in their new venture.

It has been decided by the provincial department of public works to extend the west wing of the new law courts in Winnipeg 59 feet to the north in order to afford accommodation for additional departments.

Howard S. Ross, K.C., formerly of Sydney, has formed a law partnership with E. K. Angers, a prominent French-Canadian barrister of Halifax.

The students in law at Laval University elected their officers for the current year, and they chose Aime Lafontaine as their president, Lorenzo Laurendeau for vice-president, Leon Lajoie for secretary, and Mr. Massicotte for treasurer.

Mr. N. P. Buckingham, B.A., Boissevain, Man., his wife and son, William, are on a short visit to Mr. and Mrs. Wm. Buckingham, Huron street, Stratford, and their daughter, Kathleen, is the guest of Miss Dorothy Riddell, Hibernia street. They will make their home in Victoria, B.C. Mr. Buckingham has sold his practice as a barrister at Boissevain, and also his newly built house there.

The Ontario Law School goes beyond the province in its influence.

Among the students in the present term are several Westerners, representing Manitoba, Saskatchewan, Alberta, and British Columbia. One is Charles Dufferin Roblin, son of Manitoba's Premier.

The western provinces accept certificates of attendance at Ontario Law School lectures. When the student from the setting sun has attended such lectures as he requires, he is given the requisite credentials, and returns home to write on his final examinations.

Three district Judges have been appointed for the province of Saskatchewan. A. D. Dixon, Qu'Appelle, was appointed to the Humboldt district; W. O. Smythe, Swift Current, to the Swift Current district; and C. E. D. Wood, Regina, to the Weyburn district.

Morris Katz, a law student, was sentenced to one month in jail by Judge Morgan for the theft of \$75 from his employers, Singer and Singer.

Mr. A. H. O'Brien, former law clerk of the House of Commons, who, on the reorganization of the law branch of the House of Commons, was appointed to the Justice Department at a salary of \$5,000 a year, has resigned from that position.

Donald Guthrie White, barrister, formerly of the firm of White and Laidlaw, Medicine Hat, Alberta, died in Toronto.

H. L. Jordan, city solicitor, was nominated by the members of the Saskatoon Bar recently to be a candidate for Benchers of the Law Society of Saskatchewan at the coming elections. Two candidates are being placed in the field this year by the Saskatoon bar. The second candidate is P. E. McKenzie, crown attorney and member of the firm of McCraney, McKenzie, Hutchinson and Rose, who was nominated by the local bar association a short time ago.

In the past Saskatoon has been represented by but one member. The last to fill the position was Colonel Acheson. Regina, however, has several representatives among the benchers and the local members of the legal profession believe that it is only right that Saskatoon should have two candidates in the field.

The charge against J. B. Fisher, a Guelph lawyer, of having unlawfully and fraudulently obtained the sum of \$100 from L. Loree came before the magistrate again and after hearing some more explanations from Mr. Fisher his Worship decided to commit the accused for trial. He was admitted to bail on his own recognizance.

Mr. W. A. Macdonald on Oct. 4th was sworn in as a Judge of the Supreme Court of British Columbia. The swearing in was done by Mr. Justice Morrison in the presence of Court Registrar Pottinger. His Lordship has been assigned to the bench at Revelstoke, where he will take both the civil and the criminal docket and to Nelson.

Members of the Nelson bar and the mayor and city council, in addresses, welcomed Mr. Justice Macdonald to Nelson

and congratulated him upon his elevation to the Supreme Court bench of British Columbia. As a former resident and city solicitor of Nelson, Mr. Justice Macdonald is well known in the interior of the province.

Members of the local bar present when the assizes opened were: A. M. Johnson, C. R. Hamilton, K.C., E. A. Crease, James O'Shea, E. C. Wragge, Fred C. Moffatt and T. M. Bowman, registrar of the Supreme Court. Several ladies, prominent in social life in the city, also attended Court for the occasion.

Speaking on behalf of the members of the legal profession in Nelson and Kootenay-Boundary and also on behalf of the Vancouver bar and the citizens of Nelson, Mr. Johnson welcomed Mr. Justice Macdonald.

It was felt, said Mr. Johnson, that inasmuch as it was only a short time since his lordship had left the city, and that he had represented it for a long time as city solicitor, that he was still of Nelson.

In conclusion he expressed the hope that Mr. Justice Macdonald would for long carry out the duties of the bench which he was so well fitted to perform.

Expressing his pleasure at the fact that one of the first Courts at which he had presided since being elevated to the bench was at Nelson, his lordship remarked that he had lived for so long in this city that it seemed that it was almost his home. He hoped that he would perform the duties of his position to the satisfaction not only of the members of the bar and his brother Judges but also of the public and expressed a determination to deal with all matters which came before him impartially and without fear or favour. A person who was placed in a position of public trust and performed his duties well had the greatest position in the world, and he hoped that it would always be said that he had carried out faithfully and honourably the full letter and spirit of the law.

"The council have learned with a great deal of pleasure of the elevation of W. A. Macdonald, K.C., late city solicitor, to the bench and on behalf of the mayor and also of the citizens of Nelson we desire that you will express to his lordship our hearty congratulations," states a letter from Mayor Keefe and W. E. Wasson, city clerk, to Mr. Johnson, who handed it to his lordship.

SOME REFLECTIONS ON THE LAW AS TO MONOPOLY OF TRADE.

When Paul and the other apostles were brought before the Counsel of Israel for preaching the doctrines of Christ, contrary to the mandates of that body, Gamaliel, a Pharisee and a doctor of the law, stood up in the Council and said:

"Ye men of Israel, take heed to yourselves what ye intend to do touching these men. . . . And now I say unto you, Refrain from these men, and let them alone; for if this counsel or this work be of men, it will come to nought; but if it be of God, ye can not overthrow it; lest haply ye be found even to fight against God."

So the people agreed with him. And after they had beaten the apostles they let them go with a warning not to persist in their misconduct.

This is quite the way that the world has treated its evangels bearing any new message, in all lands and times. Nothing is more painful to the conventional mind than to be compelled to deal with a new idea.

There was a much more modern Legum Doctor who spoke with authority in a similar vein and on a subject closely related to that of which I write:

"Commerce can not require anything which is unreasonable and unjust; but what experience shews that her convenience does require, that she will have, for it will still be adhered to by the common consent of the commercial world; and if the Courts should refuse to enforce it with the few who refuse to conform to such a general custom, the moral sense of commercial men will apply its still more coercive influence, which few will withstand."¹

This indeed is the true spirit of the common law which has always sought to recognize and follow the customs of the people, giving them, when not immoral, the force and sanction of law when long and generally pursued and fully ascertained.

The argument is that a trade combination, accomplished for the purpose of securing all the business possible, having no purpose otherwise unlawful, and wholly unaided by law in any monopoly which may be enjoyed, must stand or fall as an economic proposition.

¹Justice John D. Caton in *Munn v. Burch*, 25 Ill. 35.

It is no legitimate function of law to declare the illegality of such a combination nor to visit penalties upon those concerned in it. Under normal conditions, it can only succeed if, on the whole, it gives customers more for their money than they can otherwise obtain. This is the Alpha and Omega of the trust problem; all else, Court decisions, presidential proclamations, verbose legislation and platitudinous orations are but sounding brass. Hear the old Thunderer as he strikes his sledge-hammer blows at such current conventional humbug.

"Shiftiness, quirk, attorney cunning is a kind of thing that fancies itself, and is often fancied to be talent; but it is luckily mistaken in that. Succeed truly it does, what is called succeeding; even must in general succeed, if the dispensers of success be of due stupidity. Men of due stupidity will needs say to it, 'Thou art wisdom, rule thou!' Whereupon it rules. But Nature answers, 'No, this ruling of thine is not according to my laws; thy wisdom was not wise enough. Dost thou take me too for a Quackery? For a conventionality and Attorneyism? This chaff that thou sowest into my bosom, though it pass at the poll booth and elsewhere for seed-corn, I will not grow wheat out of it, for it is chaff.'"

It is idle to dispute that the essential idea of our familiar national statute against monopoly in trade is that efforts to interfere with the course of business either by combinations between rivals which tend to restrain trade or increase prices, or by the purchase of competing interests to get not only their tangibles but their clients or trade constituents, thus establishing a considerable measure of control in that field such as necessarily goes with large business, are criminal.

I do not know that this has been solemnly declared in so many words by any judicial wiseacre expounding this preposterous law. I presume it has been. It is said Lord Hardwicke declared that in the Year Books a case could be found for any proposition. What would he have said of the Federal Reporter?

But whether this has been formally and judicially declared or not, it is the necessary conclusion from many decisions. Nor is this to be obscured by much prolix expatiation on the particular enormities perpetrated by various "bad" trusts that have come under the judicial ban.

There is not much of profit to be derived from the study of the opinions of Courts in such cases. The questions involved are too large for solution in this way. Courts are necessarily conservative. Where the legislature has established rules within its competence, these must be followed by the Courts. Occasionally a Mansfield or a Marshall arises, to advance the law by the breadth and sweep of his judgments; but this is so very occasional that it is negligible.

In fact from the time when Sir Matthew Hale declared judicially that the existence of witchcraft was established by incontrovertible proofs, down to the day of the date of these presents, on all political, governmental and economic questions, the Courts have followed, in a kind of reactionary spirit, *longo intervallo*, the advanced and advancing intelligence of their time. So when great questions are worked out through other agencies and elaborated into law, then the Courts recognize the results thus obtained. I say they do; but this is not always true. For in many instances, upon strained and retrogressive interpretations of organic law, they hinder and impede efforts at social and political advancement which they are not only unable or unwilling to promote, but which they seem quite incapable of comprehending. This is not to say that they are not the oracles of the law with all that papal infallibility which the most ardent lover of Courts and Judges can claim for them. Such they are. And the law thus announced must be respected and obeyed.

"What is the law, should, because it is the law, be spontaneously obeyed by the community; or obedience be vigorously enforced by the tribunals of the country. Those who resist the law, and avow and justify the resistance, on the alleged ground that what they are thus opposing is unjust, invade the province of the legislature, by themselves enacting a practical repeal; or rather burst the constitutional and social ties; and return to that rude anarchy from which they had been rescued by the law."²

As I understand the Sherman Act, it prohibits all contracts or combinations in restraint of interstate trade, at least where they are of such size and character as to tend to monopoly in that field.

I assume that if there were two great companies which manufactured all the steel rails, beams, plates, etc., that

² Baron Smith in *Knor v. Gavin*, 1 Jones (Ir. Ex.) 190.

were made in this country in competition with each other, if one bought out the other, one purpose of that transaction being thus to occupy the entire field without competition, this would fall within the condemnation of the act.

To return to a simpler yet by no means remote time, there were say forty years ago two manufacturers making plows in Moline, Illinois. Let it be supposed that they together controlled an extensive trade, not absolutely in any particular territory perhaps, but still to such an extent that on all such matters as prices, terms, etc., they exercised a very potent influence. Neither nor both had a monopoly; but each being a strong and successful institution had a large and, except for the activities of the other, practically a controlling influence in a wide field. Now if one, accumulating a surplus a little more rapidly than the other and being a little more aggressive, thus to some appreciable extent drawing away its rival's customers, finally, largely for the purpose of getting rid of a competitor, buys out the other company with usual covenants from its active officers against competitive activity on their part, this is apparently unlawful.

Competition is the life of trade because it is believed to stimulate energetic efforts to secure trade and thus to promote efficiency and to secure reasonable prices.

Now in the case supposed, one of the companies buys out the other largely to secure additional custom. To say that this is unlawful is to check that healthful and energizing spirit which has made our domestic trade and commerce the wonder of the world. It is to strike a fatal blow at that tireless ambition to accomplish all that is humanly possible that has built up those wonderful institutions in manufacture and in trade which are the most distinctive features of our time.

But it is said if such combinations are tolerated, they will have consumers at their mercy, and will charge what they please for their conduct. May be so for a time. But sooner or later men in control of such enterprises will learn that such a course is suicidal.

In the first place it is certain to develop competition. Just now this is prevented in a measure by the Sherman Act. It operates *in terrorem*; and thus combinations already in existence before it was vigorously enforced, enjoy a certain

measure of protection from competition which they would otherwise encounter.

In the second place, a far-sighted trade policy must be based on the fundamental idea that in all exchanges there must be reciprocal advantage; and that to fix prices, even where there is an absolute monopoly, at an exorbitant figure, so as to oppress and impoverish the consumer, would be a fatal mistake. The constant tendency is, in spite of all efforts to maintain prices, for new methods and increasing efficiency to decrease the cost of production. Necessarily and inevitably the consumer must share in this advantage. The tendency, too, is in great staple lines to do business on close margins. All this is in obedience to the universal impulse to extend and hold trade. A monopoly can hardly be so buttressed and fortified as to be able to ignore these influences. Whenever it does it will invite dissolution.

Constant effort and struggle seem to be the conditions of success in every department of human activity. Whenever an industry or a trade disregards, in fancied security, this basic elemental fact, it is bound to suffer.

Nations, like individuals, have an organic growth and development, which cannot be ignored by the wise and philosophic legislator. This nation, with inestimable natural advantages, has grown great in material prosperity and resources under the inspiration of liberty. With its wonderful and rapid development there have appeared difficulties and indeed positive evils which seem to call loudly for correction. We live in a utilitarian age which is impatient of abstractions that impede the correction of concrete and conceded wrongs.

The moral sense of the country has been shocked at the outrages committed in great strikes; therefore we take away from those charged with violence in this regard, the right to trial by jury and, by a mere evasion, punish them for contempt of Court.

The press of the country has, by its extravagance and frequent disregard of high moral purpose, in large measure lost popular confidence.

So we tolerate, under the guise of punishing for contempt, when a Court is criticised, flagrant judicial invasion of the inestimable right of free speech and publication; and similar efforts to suppress unpopular oral discussion pass without general reprobation.

The cost of living has advanced, and many so-called trusts have been guilty of gross extortion and of lawless oppression. So we propose to extirpate *id omne genus*, the whole brood.

Our national faith in the efficacy of legislation is more than religious. Yet it is well to remember that legislation can not accomplish everything. The centralizing tendencies due to modern methods of travel, transportation and communication have, in the life of society, consequences as inevitable as those attending upon the operation of the laws which govern the material universe.

Dr. Van Hise, the very able and scholarly president of the great University of Wisconsin, in his recent work upon this subject, has well said:

"Concentration and co-operation in industry in order to secure efficiency is a world-wide movement.

"The United States cannot resist it. If we isolate ourselves and insist upon the subdivision of industry below the highest economic efficiency and do not allow co-operation, we shall be defeated in the world's markets. We cannot adopt an economic system less efficient than our great competitors, Germany, England, France and Austria. Either we must modify our present obsolete laws regarding concentration and co-operation, so as to conform with the world movement, or else fall behind in the race for the world's markets. Concentration and co-operation are conditions imperatively essential for industrial advance; but if we allow concentration and co-operation, there must be control in order to protect the people. An adequate control is only possible through the administrative commission. Hence concentration, co-operation and control are the key words for a scientific solution of the mighty industrial problem which now confronts this nation."

It is idle to attempt to resist the inexorable laws of commerce operating in every quarter of the globe, which tend to compel and justify centralization and consolidation as efficient and economically sound.

In the nature of things nothing of permanent advantage can be accomplished in a governmental contest against economic law.

The results of efforts at enforcing the Sherman Act have not been impressive. Neither Judges nor jurors are gener-

ally disposed to convict persons charged with statutory offenses not involving moral turpitude. In the few cases where such convictions have been obtained it will generally be found that there have been accessories in the way of frauds and oppressions practiced by those accused against their competitors, which were not at all within the purview of the act nor indeed necessary to establish its transgression.

These incidents thus wholly collateral have nevertheless furnished the moral basis for a successful accusation of statutory guilt.

Dissolutions of great trusts are decreed, the price of their products is thereupon raised, their securities advance in the markets, and their business continues without serious interference or altered character.

Mr. Lee of the Chicago Bar has well characterized these proceedings. "Like the stuffed club and slap-stick of low comedy, their employment is pleasing to the audience and does not injure the victim."

It seems to me that this preposterous statute should be promptly repealed. That accomplished, if our tariff fosters combinations by unwarranted protection of their products, such protection should be promptly withdrawn. Whether further legislation is necessary in the way of regulation seems to me matter of debate.

There can be no question that Congress under its power to regulate commerce between the states and with foreign nations, has plenary authority over this subject, extending, I make no doubt, even to the regulation of prices. Such an attempt, however, is so repugnant to our essential individualism, our belief in personal liberty, our inborn appreciation of self dependence and self protection in such matters, and the inherent practical difficulties of such an effort are so colossal that it seems to me a solution well nigh impossible. Perhaps we may come to it; but it savours too much of the blight of socialism, that deadening, withering paralysis already threatening the body politic, to make any appeal to me.

Shall we then let the people suffer and indeed suffer with them from these terrible trusts? Our efforts to abate them have thus far proved quite abortive. Possibly, if our statesmen and legislators should suspend their patriotic activities

in this field long enough to study the subject carefully, the popular distress might not in the interval be materially aggravated. I would suggest some mild remedies; a large measure of publicity would certainly be wholesome. Let legislation prescribe this and provide methods for securing it. If this were secured, trade associations and combinations might well be permitted.

Mr. A. J. Eddy of the Chicago Bar in his recent volume, *The New Competition*, has treated this phase of the question with great clearness and force. Nor has he failed in his chapter on class legislation to point out, with equal clearness, some of the disturbing elements that make legislative treatment of the trust problem so difficult.

But suppose we do not try artificial remedies for a while, but let nature take its course.

For many years the railways of this country were banded together to resist the reduction of rates. They are still; but former methods were different. They had traffic agreements, percentage pools, commissioners, etc., *ad libitum*. Yet rates for passenger and for freight traffic tended constantly downward. This was due to natural law before which the efforts of banded monopoly were ineffectual. This law operates in every field of human activity; it finds its origin in those evolutionary processes on which the progress of the race depends. Everywhere, in every line of service and of production, the tendency is towards increased efficiency and lowered costs. Inevitably the consumer has shared and must share in these advantages.

The intelligence of our legislators is not sufficient to enable them to effectively displace this principle of human activity. Some temporary advantages may seem to follow such efforts at times; but they are illusory and evanescent. For some years English legislators attempted to exclude cotton, that it might not compete with home grown flax. When it was finally admitted it became one of the greatest sources of profit to the people of that country where it has been manufactured on an enormous scale.

The aggregate intelligence, energy and initiative of individuals engaged in trade and commerce in this enlightened and progressive nation, are far more adequate to dealing with these questions than legislative wisdom; and an enlightened self interest must ultimately recognize that essen-

tial community of interest which exists between consumer and producer. Industrial and commercial freedom has made and developed our domestic trade to its present enormous proportions. Should its very greatness and prosperity suggest wanton and lawless aggression upon society, these manifestations may be properly repressed and punished; but it ought not to be put in legislative shackles nor compelled to submit to the control of administrative leading strings. For it is true now as always in the language of a great English statesman, Edmund Burke, (like many great Englishmen, an Irishman) that

“Liberty, too, must be limited in order to be possessed. The degree of restraint it is impossible in any case to settle precisely. But it ought to be the constant aim of every wise public counsel to find out . . . with how little, not how much, of this restraint the community can subsist; for liberty is a good to be improved, and not an evil to be lessened.”²

S. S. GREGORY.

Chicago.

in Michigan Law Review.

² 2 Works 229.

EXCHEQUER COURT.

CASSELS, J.]

[OCTOBER 11TH, 1913.]

IN THE MATTER OF THE APPEAL OF WILLIAM
LEONARD FROM A DECISION OF THE COMMISSIONER
OF PATENTS REFUSING AN APPLICATION
FOR A PATENT OF INVENTION.

*Patent of Invention — Feeds for Grain, Ore and Mineral
Separators — Appeal from Decision of Commissioner
under 3-4 Geo. V. ch. 17—Grounds for Refusal to grant
Patent.*

More than two years before the application for the patent in question on the appeal, the applicant had obtained Canadian letters-patent No. 110156 for feeds for grain, ore and mineral separators. The specification of the former patent after declaring the old method of separating materials such as gold and ore, cereals and seeds, by delivering them into a vertical spout from a connecting inclined spout and forcing a current of air upward through the vertical spout was ineffective, disclosed the nature of his invention as follows:

"I have found that by delivering the materials in a horizontal plane or directly across the vertical spout and therefore at right angles to the ascending air current, they are spread out in a thinner sheet so that the air current acts thereon more effectively, or in other words forces upward and separates the lighter materials from the heavier in a more perfect manner than is practicable when the materials are discharged in a downward direction."

The substance of the invention claimed in the former patent was the delivering of the materials in a horizontal plane, or directly across the vertical spout, and therefore at right angles to the ascending current of air.

Held, (affirming the decision of the Commissioner) that by the specification to his former patent the applicant had disclosed the invention now claimed, and the same must be taken to have been abandoned and dedicated to the public.

(2) A former patent, while in force, operates as a bar to the application for a new patent, and the only remedy open to the applicant, if he is in a position to invoke it, is to apply for a reissue of the former patent.

Observations on desirability of Commissioner being represented by counsel on appeals from his decisions refusing to grant patents.

Barnett-McQueen Co. v. Canadian Stewart Co. (13 Ex. C. R. 186) distinguished.

R. S. Smárt, for appellant.

Nem. Con.

EXCHEQUER COURT.

CASSELS, J.]

[OCTOBER 23RD, 1913.]

IN RE GEBR NOELLE'S APPLICATION FOR A GENERAL TRADE-MARK.

Trade-Mark and Design Act (R. S. 1906, ch. 71) sec. 4 (a) and (b)—Interpretation — General and Specific Trade-Marks—Definition.

Under the language of section 4, sub-section (a) of the Trade-Mark and Design Act (R. S. 1906, ch. 71), a general trade-mark means a trade-mark used in connection with the various articles in which the proprietor deals in this trade, and may cover several classes of merchandise if the proprietor is trading in their several classes.

On the other hand, under sub-sec. (b), a specific trade-mark is limited to a class of merchandise of a particular description, so if the applicant deals in two different classes of merchandise he must apply for two specific trade-marks, one applicable to each class.

(2) While a general trade-mark would cover all the classes of merchandise in which the applicant deals, it would not confer an unlimited right to the mark the world over as against anyone carrying on an entirely different business who applies for a specific trade-mark consisting of the same mark as applied to goods not manufactured by the owner of the general trade-mark.

W. L. Scott, for applicant.

R. V. Sinclair, K.C., for Minister of Agriculture.

THE KING v. BRADBURN & WEBB, (No. 1751).

*Public Harbour—Navigable Waters—Water Lots—Set-off—
Increased Value of Remaining Lands by Reason of Pub-
lic Work.*

Proceedings by the Crown for the expropriation of certain lands bordering on the Kaministiquia river at Fort William were taken with a view to the widening of the channel of the river. In carrying out the works, a road-allowance which intervened between the lands taken and the water of the river was expropriated leaving the lands with a frontage on the river subsequently widened.

Held, that the advantage to the balance of the lands equalized any damage to the land-owners over and above the amounts offered as compensation by the Government.

(2) Water lots had been granted after Confederation in the river by the province of Ontario. The question arose as to the compensation to be paid for these water lots.

Held, that the waters of the river were navigable waters within the statute (R. S. 1906, ch. 115) from bank to bank, and that these water lots could not be built upon by the owners thereof without the assent of the Dominion authorities.

(3) The contention was raised on the part of the Crown that the waters in question formed part of a public harbour as defined by the Confederation Act.

Held, that upon the facts they did not form part of such public harbour.

Pitblazo, K.C., and *F. R. Morriss*, for defendants.

Dowler, K.C., and *W. S. Edwards*, for plaintiffs.

POWER OF MUNICIPALITY TO PREVENT OVER-CROWDING OF STREET CARS.

BY HERBERT C. SHATTUCK, OF THE NEW YORK BAR.

Owing to the rapid increase in the population of the United States in general in recent years, and especially owing to the excessive increase in urban population, the problem of transportation which faces the modern American city is a serious one. Everywhere is seen a continual expansion of transportation facilities. The smaller cities which formerly got along very well with single-track street railways now find them inadequate and are double-tracking their streets and multiplying their car lines; the larger cities have already been compelled to resort to the air above, the earth beneath, and the waters under the earth in order to find room for their steadily increasing streams of traffic. Even as early as 1887, Judge Francis M. Finch recognised this inevitable condition when he declared that street railways may occupy every street in a city and iron the whole surface, or spin their webs in the air over every avenue, or undermine the entire system of city streets.¹

The United States census of 1910 showed that on June 30, 1907, the number of passenger street cars in use in the whole country was 70,016, an increase for the preceding five years of 16 per cent., and that the number of passengers carried upon those cars during the fiscal year ending on that date was over 9,500,000,000, an increase in the same period of 63 per cent. When analyzed, these figures indicate the enormous part played by the street railway in our time. Indeed the much criticized street car might almost be called the star performer on the stage of our modern city life. The figures quoted shew that the street cars of the nation in that one year performed a service equivalent to carrying every man, woman, and child in the country one hundred times; that the number of passengers carried on each car each day of the year averaged somewhat more than 370. It can easily be seen that, without some such method of public conveyance, the modern city would never have been possible, and that if public street transportation should now be abolished, the city would be absolutely demoralized.

¹ *Re New York Dist. R. Co.*, 107 N. Y. 42. 14 N. E. 187.

Witness the havoc wrought even in an hour with the "power off."

Naturally, then, the matter of street railways is one in which the public is chiefly and vitally interested, and their construction and operation are always charged with this public interest. The authority to make use of the public streets of a city for railroad purposes resides in the state and is a part of the sovereign power, and the right or privilege of constructing and operating railroads in the streets must always proceed from that source. City authorities derive all their power in respect to the granting of such rights from the legislature, and must exercise it in the manner and upon the conditions prescribed by the statute.²

Ordinarily the common council or other legislative body of a municipality is by statute clothed with power to regulate the streets by ordinance, and to impose reasonable regulations upon street railroads in their use of the streets. And a grant to a corporation of the right to transact business in the streets confers no immunity from any police control to which a citizen could be subjected, and a reasonable regulation of the enjoyment of a franchise is not a denial of the right nor an invasion of the franchise.³

Although a street railway franchise may constitute a contract within the protection of the Constitution of the United States, yet such contract must be deemed to have been accepted by the railway company subject to the police power of the municipality to regulate the manner in which the company shall use the streets.⁴

Reasonable police regulations concerning the operation of cars in the public streets in the interest of public safety, comfort, and convenience are sanctioned on the ground of necessity. Corporations or individuals maintaining tracks and running cars in the public thoroughfares may be compelled to do whatever is within reason required to promote these objects.⁵

This power of the municipality to regulate the operation of street railways within its jurisdiction is a broad one, and ordinances intended for the purpose will not be declared unreasonable and void by the Courts except for good cause

² *Beckman v. Third Ave. R. Co.*, 153 N. Y. 144, 47 N. E. 277.

³ *1 Nellis, Street Railroads*, 2nd ed. § 117.

⁴ *People ex rel. Geneva v. Geneva, W. S. F. & C. L. Traction Co.*, 112 App. Div. 581, 98 N. Y. Supp. 719.

⁵ *McQuillin, Mun. Corp.* § 953.

shewn. And when it appears on the face of the ordinance that its purpose is to safeguard the public welfare, or where the regulation can fairly be said to tend toward a better and safer condition, it will ordinarily be presumed to be valid, and the discretion of the council will not be interfered with upon light grounds.⁶

As applied to the control of street railways, the police power is the continuing and paramount authority of the legislature within its constitutional prerogatives, and of municipal corporations, under their delegated powers, to establish regulations, which promote the public welfare, do not unreasonably interfere with the franchise, management, or business of the company, or violate the obligations of any valid contract.⁷

Among the many subjects of regulation recognized with respect to the operation of street cars are the number of servants,⁸ screens for the same,⁹ rate of fare,¹⁰ tickets,¹¹ transfers,¹² separation of races, speed,¹³ stopping before crossing streets,¹⁴ stopping for passengers, frequency of car service, vigilant watch,¹⁵ brakes, fenders,¹⁶ warnings, use of sand on tracks, use of salt,¹⁷ and sprinkling the tracks.¹⁸

⁶ *People v. Detroit United R. Co.*, 134 Mich. 682, 104 Am. St. Rep. 626, 97 N. W. 36, 63 L. R. A. 746.

⁷ Booth, Street Railways, § 220.

⁸ See note to *South Covington & C. Street R. Co. v. Berry*, 15 L. R. A. 604, as to the validity of ordinances requiring conductor on street car.

⁹ See note to *Silva v. Newport*, 42 L. R. A. (N.S.) 1060, as to the validity of statutes and ordinances for the protection or comfort of street car operatives.

¹⁰ See note to *Sternbery v. State*, 19 L. R. A. 570, as to regulation of street railways as of fares.

¹¹ See *Rice v. Detroit, Y. & A. R. R. Co.*, 122 Mich. 677, 81 N. W. 927, 48 L. R. A. 84.

¹² See *Chicago Union Traction Co. v. Chicago*, 199, Ill. 484, 65 N. E. 451, 59 L. R. A. 631, and *Ex parte Lorenzen*, 128 Cal. 431, 79 Am. St. Rep. 47, 61 Pac. 68, 50 L. R. A. 55.

¹³ See note to *Ford v. Paducah City R. Co.*, 8 L. R. A. (N.S.) 1093, as to operating street car at speed in excess of that prescribed by ordinance as negligence, and see *State, Cape May, D. B. & S. P. R. Co., Prosecutor v. Cape May*, 59 N. J. L. 393, 36 Atl. 679, 36 L. R. A. 656.

¹⁴ See *State, Trenton Horse R. Co., Prosecutor v. Trenton*, 53 N. J. L. 132, 20 Atl. 1076, 11 L. R. A. 410.

¹⁵ See *Fath v. Tower Grove & L. R. Co.*, 105 Mo. 537, 16 S. W. 913, 13 L. R. A. 74.

¹⁶ See *State, Cape May, D. B. & S. P. R. Co., Prosecutor v. Cape May*, *supra*.

¹⁷ See *State, Consolidated Traction Co., Prosecutor v. Elizabeth*, 58 N. J. L. 619, 34 Atl. 146, 32 L. R. A. 170.

¹⁸ See note to *St. Paul v. St. Paul City R. Co.*, 36 L. R. A. (N.S.) 235, as to power to compel street railway to sprinkle tracks.

Similarly, the power of a municipality to make reasonable regulations for the prevention of overcrowding in street cars has often been recognized and is generally admitted, since overcrowding tends to the discomfort and inconvenience of, and danger to, the public.

Thus it has been held proper for a city to make it unlawful for a street railway company to permit a greater number of passengers to ride in any car than one and one third the number of seats provided in the same.¹⁹

And an ordinance requiring the street railway company to furnish a sufficient number of cars on each separate line to carry passengers comfortably and without overcrowding, and providing a penalty for its violation, is also within the police power of a city. Such an ordinance has for its object the laudable purpose of protecting the traveling public against discomfort, annoyance, and danger; and, being designed to promote the public safety and health, it will be sustained.²⁰

An ordinance of the city of Minneapolis provided, first, that the street railway company should post in its cars the number of people to be reasonably carried in each car; second, that the company should continuously provide and operate upon every part of each car line within the city a sufficient number of cars to receive and carry all persons desiring transportation thereon, without admitting into any such car more passengers than the carrying capacity thereof (75 in that case); and third, that whenever any passengers should be admitted in excess of the carrying capacity, the company should forfeit a certain sum for each and every passenger so admitted. The ordinance was held valid as within the power of the city in the exercise of the functions committed to its care by the state. The Court emphasizes the fact that no penalty was provided for failure to comply with the second requirement, and that in regard to the third stipulation, the company was not required to receive more than the carrying capacity, but might run a car from one end of the line to the other, if filled to its capacity, without stopping anywhere except to allow passengers to alight, and might thus avoid the penalty. It was stated as a general

¹⁹ *South Covington & C. R. Co. v. Covington*, 146 Ky. 592, 143 S. W. 28. — *L. R. A. (N.S.)* —.

²⁰ *Chicago v. Chicago City R. Co.*, 222 Ill. 560, 78 N. E. 890.

principle that cities may properly make such regulations of street car companies as are deemed necessary for public convenience, safety, or health, and that the question of expense to which the company is put in order to comply with such regulations is not important.²¹

And in a recent New Jersey case, where an ordinance required the street railway corporation during designated "rush" hours to run from certain congested terminals "a sufficient number of cars to provide with a seat every passenger from whom a fare is demanded," it was conceded by the railway corporation that the police power of the city fairly included such regulation of their business out of regard for the comfort, safety, and health of the passengers, and it was contended simply that the ordinance was unreasonable because of the impossibility of compliance therewith.

In delivering the opinion of the Court, Judge Pitney remarks that although the situation was difficult, yet it was such as to render it proper that the traction company should be required to do all that reasonably lay within its power to furnish a sufficient number of cars to accommodate the passengers comfortably, and it was held that the ordinance was not so unreasonable as to be void, especially in view of the fact that no effort had yet been made by the traction company to comply with it.²²

And under a statute granting local authorities the power of making and enforcing rules and regulations with respect to tramway carriages, a borough council may require every proprietor of a tram carriage, to cause a statement of the number of passengers authorized to be carried at any one time in and upon such carriage to be painted conspicuously on the inside and outside of such carriage, and may further provide that no proprietor or conductor of any tram carriage shall suffer to be carried at any one time in or upon such carriage a greater number of passengers than will admit of the provision of seating accommodations to the extent at least of 16 inches from side to side and 15 inches from front to back of every seat for each person carried, and of accommodations to enable every such person to sit with ease.²³

²¹ *Minneapolis Street R. Co. v. Minneapolis*, 189 Fed. 445.

²² *North Jersey R. Co. v. Jersey City*, 75 N. J. L. 349, 67 Atl. 1072.

²³ *Smith v. Butler*, L. R. 16 Q. B. Div. 349, 34 Week. Rep. 416.

However, where an ordinance of the city of St. Louis required the street railway company to report quarterly to the city register as to the number of trips made and passengers carried during the quarter, and also required the register, if any report shewed that the company had carried an average of over eighteen persons per trip to each car since the last previous report, to inform a police justice of that fact, and the ordinance further provided that this situation should subject the company to a fine, it was urged that the second provision was unreasonable and illegal, and that the first was so connected with it that both must fall together. And the Court, in holding the first provision valid and separable from the second, implies that the latter may be invalid, though there is no explicit statement to that effect.²⁴

And in the Minneapolis case, *supra*, reference was made to a "case from the city of Detroit" which seems not to have been reported. It is said, however, that in that case an ordinance required the street railway company during certain hours of the day to provide a sufficient number of cars to accommodate passengers, so that no car should carry a greater number of passengers than its seating capacity and one half as many more; and further required any car when signaled, to stop for more passengers, although already filled to or in excess of the number specified, unless another car should be following within a distance of 200 feet, under penalty of a fine. As a result, the only way the company could comply, without being liable to the penalty, was by running cars every twenty seconds, and this was deemed to impose so tremendous a liability and obligation upon the company in the purchase of new equipment that the ordinance was held to be unreasonable and void.—*Case and Comment*.

²⁴ *St. Louis v. St. Louis R. Co.*, 89 Mo. 44, 58 Am. Rep. 82, 1 S. W. 305.

A MODEL BILL OF COSTS.

The other day the lawyer had occasion to lunch at his client's hotel, and at the close of the meal the following bill of costs was presented to him:—

	Francs.
Preparing Luncheon	2.50
Perusing Bill of Fare	4
Two Consultations with the Greengrocer	1
Carrying up the Soup	1
Blowing on the Soup .....	.50
Taking Fly out of Soup .....	.50
Herbs for Soup	1
Soup	2.50
Waiter bowing and scraping .....	.50
Two Consultations with the Cook	2
Six kinds of Meat and Vegetables	12.50
Saying, "I hope you'll enjoy your luncheon" ....	.50
Ten Visits to the Cellar	10
Sundry Acts of Courtesy, etc.	2
Matches .....	.50
Wine and Cigars	8
Reading Bill of Fare aloud .....	.50
Serving Dessert	1
Dessert	7.80
Clearing the Table	1.50
Satisfaction of Hunger .....	.50
Wear and Tear and Breakages	3.50
Letting down Window Shutters	2
Clearing away remains of Luncheon	4
Salt and Touching Saltspoon .....	.50
Verifying present Bill of Costs	2
Surprise on receiving it	2
Acceptance of Bill .....	.50
Receipting same .....	.50
Wishing good-bye	2.70
<hr/>	
Total	78.00
10 per cent. discount	7.80
<hr/>	
	70.20

The lawyer, as his client had done, paid the bill without demur.

RECOVERY OF GAMING DEBTS.

An instructive contrast between the treatment of similar questions in the High Court and the County Court is furnished by the hearing of the case of *Rafford v. Wrigley* by Mr. Justice Bucknill (May 3) and the judgment delivered by Judge Shand in the previous week (April 24) at Liverpool, in the case of *Charles & Co. v. Baldwin*, reported in the last issue of the *County Courts Reporter*. In both cases the question arose whether, where winnings on bets had been settled by cheques which had been endorsed by the payees and paid through their bankers, the drawers of the cheques could recover the amounts so paid as payments which, under the provisions of the Gaming Act, 1835, sec. 2, could be regarded as debts due by the payees to the drawers. Mr. Justice Bucknill, ignoring altogether a judgment of a County Court Judge (in *Collis v. Girling*, cited 2 C. C. Rep. 47), which was handed to him as supporting the plaintiff's contention, held simply that the defendant's general plea under the Gaming Act prevailed. But he gave no indication of any guiding rule or principle which could be applied to other cases. In the County Court judgment, however, there was a full consideration of the authorities, and it was shewn that, by a judgment of Chief Baron Palles in an Irish case (*Lynn v. Bell* (1876)) there was no ground for the suggested application of sec. 2 of the Act, which was intended only for the protection of *bona fide* holders, without notice, of such securities. Some Judges of the High Court have a curious way of shewing scant respect for the Gaming Acts and of visiting those who raise them as a defence with their implied censure. In the case before Mr. Justice Bucknill the successful defendant who had been dragged into the High Court, was allowed only County Court costs. In another case on the same day, before Mr. Justice Lawrence, no costs at all were allowed to a defendant who successfully raised the same defence. The policy of the law being to discourage gaming by not allowing any betting debts to be recovered, it is rather to be deprecated that Judges should act on a contrary principle by reserving their discouragement for those who avail themselves of this legal defence.—*Law Journal*.

THE RIGHT OF "DOLEANCE."

The most ancient jurisdiction of the Privy Council is concerned with the hearing of appeals from the Channel Islands. When in the time of Edward I. Royal Courts were established for all important cases in the English domains, and the final appeal lay to the King in Parliament, the Channel Islanders claimed and obtained the right to have heir-petitions against judicial, and also administrative, grievances heard by the King in Council. They were the King's subjects in right of the Duchy of Normandy, and they desired to retain the old feudal privilege of appealing to their lord "*et son Conseil*." That right, which was accorded to them in the fourteenth century, has been maintained with little modification to our own times; and they still enjoy special privileges before the King's Council which pertain to no other subjects of the Crown. Not only is there an appeal as by right from judgments of the Courts of Jersey and Guernsey, which are far below the appealable amount for cases from the dominions and colonies, but a peculiar institution, the "Doléance," is reserved for any inhabitant of the islands who considers himself aggrieved by any action of the Courts or the Executive. In virtue of this privilege he may petition the Privy Council to recommend His Majesty to send "an advice" to the Court to annul or modify its sentence; and the Council refers such a Doléance to a special committee. The most recent example of the exercise of this right is the petition as to the election of a Jurat in Jersey, which was heard a few weeks ago by a committee of the Council, on which the Lord President (Viscount Morley), the Home Secretary, and Sir Robert Romer, were sitting. The petitioner was a solicitor, or *écrivain*, of the Royal Court of Jersey, who a year ago was elected by popular vote to a vacant place among the Jurats (or Judges) of the Court. This tribunal, however, which has finally to ratify the election, refused to swear him, on the ground that he had been suspended some years ago from a Curatorship which he held, and was therefore not a fit person to hold the judicial office. The committee eventually held that there were sufficient reasons for advising the King to interfere on the *écrivain's* behalf, thus illustrating, in a very picturesque way, how the sovereign to this day remains personally the ultimate fountain of justice for his subjects.—*Law Journal*.

ADVERSE WITNESSES.

Sooner or later every advocate has to face the unpleasant experience of having his case let down by a witness he has himself called in support of that case. Frequently a witness fails to swear up to his proof; sometimes he gives evidence directly opposite to that expected from him. Under such circumstances, what is the advocate to do? He has to decide quickly, and upon his decision the result of the case will often largely depend. At such a moment self-possession, experience, and knowledge of the tribunal and of his opponents are invaluable assets, which will often make him do the right thing, perhaps almost subconsciously. Suppose he decides that he must at once attempt to rectify his witness's default, how can he do it? If he has other evidence of the particular fact on which he can rely, he had better decide to trust to such other evidence, and when the time comes do what he can to erase or mitigate the impression made upon the Court by the unexpected statement. When a witness is called by a party to prove his case, and he disproves that case, the party is still at liberty to prove his case by other witnesses, and it is quite legitimate for the advocate to submit that the surprising witness was honestly mistaken in his impression of the particular fact. It would, as was pointed out nearly a century ago in *Ewer v. Ambrose*, [1825] 3 B. & Co. 746, be a great hardship if this could not be done, for if a party had, say, four witnesses upon whom he relied to prove his case, it would be very hard that by calling first the one who happened to disprove it, he should be deprived of the testimony of the other three. If he had called the three before the one who had disproved the case, it would have been a question for the jury upon the evidence whether they would give credit to the three or to the one, and the order in which witnesses happen to be called ought not to make any difference in this respect. Consequently, we get the old rule of evidence which has been expressed as follows: If a witness proves facts in a case which make against the party who called him, the party may call other witnesses to prove that those facts were otherwise; for such facts are evidence in the cause, and the other witnesses are not called directly to discredit the first witness, but the impeachment of his credit is incidental and consequential only. It may be objected that

this rule has been altered by the provisions of s. 22 of the Common Law Procedure Act, 1854 (17 and 18 Vict., c. 125), and of the replacing sec. 3 of the Criminal Procedure Act, 1865 (28 and 29 Vict., c. 18), which enact that "a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, *in the opinion of the Judge, prove adverse*, contradict him by other evidence, or, by leave of the Judge, prove that he has made at other times a statement inconsistent with his present testimony." We shall have to refer again to this provision; our present purpose is only to draw attention to the words we have printed in italics, which, on the face of them, appear to vary the old rule that it was for the advocate to consult only his own judgment in calling the other witnesses, by imposing a condition that this can only be done when the Judge has expressed a certain opinion. In practice, however, the apparent limitation is ignored, and the old rule maintained. In the course of the argument in *Greenough v. Eccles*, ([1859] 5 C. B. (N.S.) 786), Williams, J., observed: "There is evidently some blunder in the section. In all probability it was intended to be read thus— 'But he may contradict him by other evidence, or, in case the witness shall, in the opinion of the Judge, prove adverse, by leave of the Judge prove that he has made at other times a statement inconsistent with his present testimony.' " And in the same case it was generally admitted that long before the Act of 1854 it was settled law that if a witness gave evidence contrary to that which the party calling him expected, the party was at liberty afterwards to make out his own case by the testimony of other witnesses. The same Judge, in giving judgment, declared that it was impossible to suppose the Legislature could have really intended to impose any fetter whatever on the right of a party to contradict his own witness by other evidence relevant to the issue, a right not only fully established by authority, but founded on the plainest good sense, and his remarks were endorsed by Willes J., while Lord Cockburn C.J. was most precise in his indictment of the provision in question. Said he, "Looking at the section, I think it is clear that there has been a great blunder in the drawing of it, and on the part of those who adopted it. The first two branches of the section were evidently intended to be declaratory of the existing law, but the third branch goes far beyond it. It was intended to

give a party producing a witness an opportunity, with the leave of the Judge, if the witness should prove adverse, of shewing that he had previously made a statement contradictory to his then testimony. But, unfortunately, the word 'adverse,' instead of preceding the third branch of the section only, is made to precede the second branch, which is clearly declaratory of the existing law; so that, if the word 'adverse,' in the second branch of the section is to receive the same interpretation which it is now considered it ought in the third branch to bear, there would be imposed an additional restriction to that which existed before the statute upon the right of a party calling the witness to shew by other evidence facts which the witness had contradicted. If, therefore, it were necessary to put an interpretation upon the word 'adverse' with reference to the second branch of the section, I should incline to think it impossible that the Legislature could have intended to use that word in a sense which would impose a restriction which did not before exist. However, perhaps the better course is to consider the second branch of the section as altogether superfluous and useless." And this is what has been done in the fifty years that have elapsed, though it is little to the credit of our desire for legislative accuracy that the misleading and ignored provision still remains on the statute book.

There has been some conflict of opinion as to what is the result of a party calling evidence which incidentally contradicts his own prior witness on one part of that witness's evidence. Lord Campbell C.J., in *Faulkner v. Brine*, [1858] 1 F. & F. 254, expressed the view that the whole of the witness's evidence was swept away by the contradiction, but the better and prevailing opinion seems to be that the uncontradicted portion remains, and may be acted on, though its value may very naturally be impaired in the eyes of the jury or of the Court. See *Bradley v. Ricardo*, [1831] 8 Bing. 57. In this connection we may note the *dictum* of Hamilton J. in *Summer v. John Brown & Co.*, [1909] 25 T. L. R. 745, that when two equally credible witnesses called by a party flatly contradict each other, it is not competent for the party calling them to seek to discredit one and accredit the other. In a further article we propose to discuss the rule as to discrediting a witness and the general treatment of hostile witnesses.

One of the leading rules of evidence precludes an advocate from impeaching the credit of a witness whom he has himself put forward as a person worthy of belief. He may, as we have seen in our former article, contradict him on a specific point, if he is able to do so by other revelant evidence; but he cannot be permitted any general right to attack the credit of his own witness whose evidence turns out to be unfavourable, even though the witness assumes a position of hostility towards the party on whose behalf he is called. This was the rule at common law, and is affirmed by the sections of the Criminal Law Procedure Act, 1865, to which we have already referred, and which, it may be noted, apply to all Courts of Judicature, as well criminal and all other, and to all persons having by law or by consent of the parties authority to hear, receive, and examine evidence, whether in England or in Ireland. The statute, it will be remembered, declares that a party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but in case the witness shall, in the opinion of the Judge, prove adverse (see p. 327 *ante*) the party may, by leave of the Judge, prove that the witness has made at other times a statement inconsistent with his present testimony.

It is probable that the statutory provision was intended to do away with the uncertainty that then prevailed as to the exact position of a party who was let down by his own witness turning upon him. The law had been discussed in a number of cases, notably in *Wright v. Beckett*, [1834] 1 Mood. & R. 414, where Lord Denman C.J., after examining the earlier decisions, had declared admissible (Bolland B. dissenting) evidence shewing that a witness had before the trial given to the party calling him an account of the transaction entirely different from that sworn to by him at the trial. In subsequent cases—e.g., *Dunn v. Astlett* [1838] 2 Mood. & R. 122, *Holdsworth v. Mayor of Dartmouth*, [1838] 2 Mood. & R. 153, *Winter v. Butt* [1841] 2 Mood. & R. 357, at *nisi prius*—this ruling had been bath approved and disapproved, and in the state of uncertainty so created it was very desirable that the exact rule should be stated for the guidance of both Judges and advocates. However that may have been, it is clear that under the statute the advocate has no general right, and that it is for the Judge, not for the advocate, to decide whether the witness is adverse or not; and from the Judge's statement of opinion on this point there

is no appeal. In this respect the judicial discretion is absolute and final. *Rice v. Howard*, [1886] 16 Q. B. D. 681, followed in *R. v. Williams*, [1913] 77 J. P. 240. The adverse attitude may be gathered from the actual evidence of the witness, from his manner or behaviour in the box, or from his refusal to give proper answers to proper questions. "Adverse" means hostile, not merely unfavorable—*Greenough v. Eccles*, [1859] 5 C. B. (N. S.) 786—and hostility involves some expression of *animus*—that is, the Judge must be of opinion that the witness is not desirous of telling the truth to the Court. *Coles v. Coles*, [1866] L. R. 1 P. & D. 70. A witness who contradicted his proof has been treated as hostile—*Anstell v. Alexander*, [1867] 16 L. T. 830—but not one who only contradicted his informal statements to the solicitor. *Reed v. King*, [1858] 30 L. T. 290. In *Pound v. Wilson*, [1865] 4 F. & F. 301, Erle C.J. said that if a party has been induced to bring a case into Court from a statement which a witness has previously made in a Court of Bankruptcy, and the witness gives different evidence in Court, he may be examined as to his former statement as an adverse witness.

Before the refuting evidence of a previous statement can be given, the hostile witness must have his attention called to the matter, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to him, and he must be asked whether or not he has made such statement. The previous statement may be contained in evidence in other proceedings, in letters, or have been made in course of conversation with other people, or in any way that is capable of proof in the present proceedings; but it is not necessary that the two statements should be directly or absolutely at variance; the one sought to be put in proof need only have tendency to contradict or to be inconsistent with the witness's present evidence, and it is for the Court or the Jury to ultimately decide, upon having the two statements before them—*Jackson v. Thomason*, [1861] 31 L. J., Q. B. 11—which is to be accepted. It is important to remember that in a criminal case the contents of a previous statement put in to contradict and to discredit a witness are not evidence against the prisoner, and great care should therefore be taken to prevent the jury being adversely influenced against him by anything contained in the statement. *R v. Dibble*, [1908] 72 J. P. 498.

Even apart from actually contradicting or proving a previous inconsistent statement by one's own witness, it is open to an advocate, where a witness on his examination in chief shews himself decidedly adverse to the party on whose behalf he was called, to request permission of the Judge to put his questions in the same way as if he were cross-examining the witness, or, in other words, to put leading questions to the witness. The mode in which the examination of a witness shall be conducted—*Bastin v. Carew*, [1824] Ry. & Mood. 127—is always in the discretion of the Judge, and a Judge who determines from the manner of a witness that he is really hostile to the party calling him, is quite at liberty to allow that party's advocate the greater latitude allowed to the opposing counsel. But a witness cannot be so treated without the leave of the Judge, and whether the leave be given or withheld is entirely in the discretion of the Judge, even where the witness is actually the other party in the proceedings. *Price v. Manning*, [1889] 42 Ch.D. 372. Without mentioning all the numerous cases on the subject, it may suffice to say that the practice is the same in both civil and criminal proceedings, and in both it is in the discretion of the Judge how far he will allow the examination-in-chief of a witness to be by leading questions or to assume the form of a cross-examination. See *R. v. Murphy*, [1837] 8 C. & P. 297. When the leave is given, it does not carry with it all the rights of cross-examination; the questions put must be relevant and material to the issue, and questions whose object is merely to test the credit of the witness, or to emphasize his hostility, cannot be put, nor, by virtue of the statutory provisions, can his general character be attacked by the party calling him. Where, however, a witness at the trial gives evidence contradictory to facts contained in a deposition made by such witness in a former proceeding in the same case, it is open to the Judge to read such deposition to the witness and the jury, in order to impeach the credit of the witness. *R. v. Oldroyd*, [1805] Russ. & Ry. 88. In such a case it is the Judge who is endeavouring to shew where the truth lies, not the advocate trying to neutralise inconvenient evidence.—*Queensland Justice of the Peace*.

POSSESSION AS A ROOT OF TITLE.

In these days when nearly every transaction connected with land is committed to writing there is a tendency to overlook the importance attached by the law to mere possession, but nevertheless possession still remains a root of title. In very early days, no doubt, possession was practically the only title to land; he was the owner who, with his retainers, was strong enough to take, and then to retain, possession. And in the more civilized of ancient communities land was transferred from one person to another by physical possession being given in the presence of witnesses. A record of what was done might be drawn up and signed, as in the case of livery of seisin, but the writing did not constitute the title to the land; it was merely evidence in support of the title.

If a person to-day enters upon and takes possession of a parcel of land, without any title or even color of title thereto, but merely as a wrongdoer, what is his position in the eyes of the law? At first no doubt he is a mere trespasser, and could be evicted by the true owner, or by any person, not being the true owner, who was in possession of the land. But this latter person may himself have originally been a mere trespasser. This raises the question, At what point of time does the original taking of possession by a stranger to the title cease to be regarded as a mere trespass, and evolve into the "possession" that is so respected by the law? The answer appears to be, When he has remained for some time in peaceable possession of the land, exercising with respect to it the ordinary rights of an occupier.

In *Doe d. Hughes v. Dyeball*,¹ the plaintiff in ejectment proved a lease to himself and a year's possession, and rested his case there. The defendant, who had forcibly taken possession, objected that no title was proved in the demising parties to the lease. Lord Tenterten, C.J., said: "That does not signify; there is ample proof; the plaintiff is in possession, and you come and turn him out; you must shew your title."

The failure on the part of the plaintiff to prove that his lessors had title obviously made the lease worthless as

¹Moody and Malkin's Reports, 346 (1829).

evidence of the plaintiff's title, and the plaintiff succeeded on the other evidence adduced by him, viz., that he had had a year's possession. Thus the case shews that possession in the plaintiff and nothing more is sufficient to enable him to maintain ejectment against a stranger.

In *Asher v. Whitlock*,² Cockburn, C.J., referring to the above mentioned case, said: "In *Doe v. Dyeball* one year's possession by the plaintiff was held good against a person who came and turned him out, and there are other authorities to the same effect," thus putting that case upon possession alone.

Perhaps the most emphatic way in which the law shews its respect for possession is by its rule that "the fact of possession is *prima facie* evidence of seisin in fee."³

"The wrongful seisin acquired by a disseisor gave him a real, though wrongful estate, a 'tortious fee simple' valid as against everyone but the person truly entitled, and capable of being made right and perfect by a release from that person to the person in actual seisin."⁴ This is very instructive. The law insisted on livery of seisin, but when once a person had been put in possession by this means he was capable of taking a release by deed of an estate in remainder. Here we see that the real owner could perfect the title of a disseisor by giving him a release, no livery of seisin being necessary.

The necessity of possession as a root of title explains the rule of common law which prevented a person from conveying to himself. "The ancient Common Law essayed to wield the land itself,—'the most ponderous and immovable of all the elements.' Hence all its rules and form regarded real property as more or less identified with actual possession. The single consideration that livery was the primitive mode of conveyance, for which other forms were but substitutes, and that a man could not deliver seisin to himself, explains many otherwise inexplicable doctrines."⁵

A person occupying land without any title has a devisable interest therein, and if he settles it by his will for successive estates those estates take effect as against a person who enters upon the land, and ejectment may be maintained accordingly.⁶

² Law Reports, 1 Queens Bench 5 (1865).

³ Per Mellor, J., in *Asher v. Whitlock*, 6; See also Newell on Ejectment (1892), 433.

⁴ Pollock and Wright on Possession, 94, citing Co. Litt., §473.

⁵ Hayes' Elementary View of Uses, 80 (1840).

⁶ *Asher v. Whitlock*, *supra*.

And the interest of a mere possessor may also be inherited or conveyed. Moreover if the land be taken compulsorily he is entitled to compensation.⁷

In the last cited case, the decision in *Doe d. Mary Carter v. Barnard*,⁸ was disapproved of as being inconsistent with *Asher v. Whitlock*, already cited, and with the views of Mr. Preston, Mr. Joshua Williams, Professor Maitland and Mr. Justice Holmes. The reporter adds a reference to an article by Professor J. B. Ames in the *Harvard Law Review*.⁹ In the above cited case of *Doe v. Barnard* the plaintiff in ejectment, though having had thirteen years' possession, failed in her action against a defendant (who had turned her out), on the ground that her own case shewed possession, and therefore a presumed fee simple, in her late husband, and shewed also that her husband left an heir. The plaintiff's possession was not connected with her husband's, and the defendant was allowed to set up the title of the heir in answer to the plaintiff's claim. As above shewn the case has been disapproved of.

If A, having no title, should acquire possession and hold it *animo dominendi* for say one year and then mortgage the property to B and remain in possession paying the interest, and then C, a stranger, acquired and held possession for less than 20 years, also *animo dominendi*, it would appear that B, the mortgagee, (although neither he nor the mortgagor had obtained a title under the Statutes of Limitation) could eject C, since B would claim under the earlier possession. A's possession would be *prima facie* evidence of his seisin in fee; would be capable of conveyance to his mortgagee, and the mortgagor's possession would be attributed to the mortgagee.¹⁰ (The mortgagee, in the case above put, would, of course, not be claiming adversely to the mortgagee.) A title would therefore be set up good as against all persons except the true owner proving right to immediate possession. Or if, in the simpler case, without there being any mortgage, A held peaceable possession for one year, and went out of possession, *animo revertendi*, and C took possession and held it for any period less than required by the Statutes of Limitation A could in like manner eject him in reliance on his (A's) earlier possession and presumed fee simple.

⁷ *Perry v. Clissold* (1907). Law Reports, Appeal Cases 73.

⁸ 13 Queen's Bench 945 (1849).

⁹ Vol. 3, p. 324, n.

¹⁰ Cole on Ejectment 462, 479 (1857).

The case first put of there being a mortgage is exemplified by "*Doe on the several demises of Smith and Payne v. Webber.*"¹¹ The plaintiff Payne had been in possession for a number of years, though no statutory title was relied on. Then he mortgaged the property to the plaintiff Smith, but remained in possession, paying the interest on the mortgage. After the date of the mortgage the defendant brought ejectment under some claim of title against the plaintiff Payne (who was still in possession) and the cause was submitted to arbitration, which went in favour of the defendant, who thereupon went into possession under a writ of *habere facias possessionem* and remained in possession for about six years before the action was brought. The defendant set up the award as against the plaintiff Smith, who was proved to have been present at the arbitration proceedings, but not to have taken any part in them. The evidence was ruled out as being *res inter alios acta*, and the plaintiff Smith obtained the verdict. All that the case decides is that the evidence was rightly rejected.

It would be interesting to know what direction was given by the trial Judge to the jury, but it is not reported. The verdict seems, however, to have been right. The plaintiff Smith was deemed to be in possession by reason of his mortgagor's continued possession and payment of interest, and the defendant had not acquired a statutory title.

The effect of the case is thus given in Pollock and Wright on Possession: "Ten year's possession has been decisive even against several years' subsequent possession under colour of title."¹²

As exemplifying at once the risks attending *nisi prius* practice and the necessity of some system of registration of title or of deeds, it appears that the defendant went to trial in ignorance of Smith's title, and had trained the evidence concerning the award against the plaintiff Payne. Then, discovering the mortgage, the defendant sought to deflect this evidence against the mortgagee, which was not allowed. The two plaintiffs appeared to have been working together in the action, and it was complained by the defendant's counsel that Payne was going behind the award by way of using Smith's name as a second plaintiff.

¹¹ 1 Adolphus and Ellis, 119 (1834); 3 Law Journal, King's Bench, 148; 3 Nevile and Manning 746.

¹² P. 96.

The minor, though none the less important, question of the costs of the evidence concerning the award was later dealt with,¹³ when the defendant was allowed such costs as against Payne, as costs of the issue found in favour of the defendant as against Payne, who, of course, could not succeed in face of the award.

The doctrine that possession is a root of title exists independently of the Statutes of Limitation. It is true that the Judges, when speaking of a title by possession short of a statutory title, generally go on to say that the title is one that may ripen into an absolute title, but it seems clear that a possessory title would be recognized by the Courts if there were no Statutes of Limitation. It would follow, therefore, in a case where no Statute of Limitation operated, that so long as a mere possessor was left in undisturbed possession by the true owner and those rightfully claiming under him, he, the possessor, would have a title recognized by the Courts, and one that would descend to his heirs or could become the subject of conveyance or devise, and would be good as against all the world except the true owner for the time being.

In conclusion it may be pointed out that where there have been several successive possessions by strangers to the title, the last possessor can take advantage of the prior possessions only if all the possessions have been continuous, and are connected as of right.

T. F. MARTIN.

In University of Pennsylvania Law Review.

Wellington, New Zealand.

¹³ 2 Adolphus and Ellis 448.

NOTES ON THE HISTORY OF COMMERCE AND COMMERCIAL LAW. 2. THE MIDDLE AGES.

Three prime requisites of commerce are: (1) means of transport; (2) freedom of labor and exchange; (3) security. In antiquity to obtain these conditions the struggle was a hopeless one, though there were periods when they were more or less assured. Commercial colonies were founded in Spain by the Phœnicians in the beginnings of history;¹ the Rhodian fleet was a merchant marine; Athens acquired her great naval strength by a conscious political policy; military Rome played the equivocal role of destroyer,² pacifier and law-giver.

Commerce is a complementary expression of the other material activities of society. The commerce of antiquity, relatively speaking, flourished at periods not because of the state of society and government, but in spite of certain of their dominant characters.

Means of transport were rudimentary. By land it was more perilous and burdensome than by sea. The transport of any considerable volume over long distances was impossible. Trans-shipment was always frequent. By water, the routes followed rivers and coasts. Without the compass the mariner did not dare to venture far beyond the sight of land, and rarely left the enclosed seas.

Freedom of labour and exchange existed only to a very limited degree. According to the theory of the ancient state the governed owed their rights to the state; the state did not owe its powers to the willingness of the governed. The liberty, industry and property of the individual were at the disposal of the state.

Security was conspicuously lacking. The ancient state regarded the foreigner as an enemy. Besides the material difficulties of transportation there were the added perils of highwaymen and pirates. Commercial supremacy was believed to depend upon monopoly won by the destruction of all rivals. Little sanctity was accorded the right of property. Commerce had to arm itself and so dissipate its forces in antagonistic fields. Insurance was unknown. The Roman

¹ Cadiz, Malaga, Sevilla, Cordoba. The Carthaginians, following the Phœnicians, founded Barcelona and Cartagena and occupied Cadiz.

² For example the destruction of Carthage, Corinth and Palmyra.

jurisconsult gave but relatively scant attention to the field now known as commercial law. Under such conditions mutual confidence and credit could scarcely exist.³

The fall of the Western Empire (476 A. D.), may be taken as a convenient date to terminate the history of antiquity. The ancient civilization continued in the Greek Empire though the importance of this was for the time obscured by the transforming events that were succeeding one another in the rest of Europe and isolating the two parts of the continent.

The thirteen hundred years that transpired between the fall of Rome and the French Revolution may be divided into two periods: the first extended to the 16th century, the period of the world discoveries, and constitutes the Middle Ages; the second extended from the 16th century to the French Revolution, and is the period of the birth of modern national commerce and national commercial law. The three elements: means of transport, freedom of labour and exchange, and security, became so far a realized fact in the first half of the 19th century, that the unparalleled commercial development of the second half was a natural consequence.

The period of the Middle Ages divides itself into two epochs: first, that of almost complete prostration of commerce; the second, that of the revival, ushered in in the 11th century by the Crusades.

Bridging over these years of transformation in the west the Greek Empire successfully fought off the Barbarians from the north, to fall in the year 1453 before the Mahometans from the south. But the paralysis of commerce over the rest of Europe could not but be felt in Constantinople. Besides, like Rome, Constantinople was principally a centre of consumption and distribution. Trade still continued between Constantinople and Asia Minor and Egypt, and the importance of the capital as a distributing centre for eastern goods increased after the re-establishment of relations between the orient and western Europe that followed the Crusades. The advance of the Mahometans gave the commercial predominance to Venice and finally became one of the causes of the latter's decline.⁴

Two great collections of laws, that of the Emperors Justinian and Basil, appeared in Constantinople after the fall of

³ Encyc. Brit. Vol. 6, "Commerce."

⁴ Manzano, *Curso de Derecho Mercantil*, Vol. I, p. 190.

the Western Empire, but as they were the products of the ancient civilization and not of the new that was in the making in Western Europe, they must be considered as belonging to antiquity⁵

In the west, during the period of prostration, Marseilles and Venice, no doubt, maintained some trade by sea. Under Charlemagne the southwestern German cities shewed some commercial activity. The invasions of the Normans, destructive as they were, disseminated a knowledge of northern geography and of the art of navigation.⁶

The invasions had an immediately destructive effect upon the commerce of western Europe. The needs of the invaders were so primitive that they were easily satisfied by the locality. Trade all but ceased except within limited areas. A vast amount of wealth disappeared. At first the invaders respected the institutions of the conquered and the confused period of personal law ensued during which the individual may be said to have carried his law on his back. Finally the organization of society was completely altered by feudalism.⁷

The feudal system, by which a military chief parcelled out the conquered land to his generals in return for services, who, in turn, divided it similarly amongst their subordinates, created a military society obviously unfavourable to commerce. Real estate was enhanced in value at the expense of personal, which is the medium of commerce. The individual, who in antiquity had belonged to the state, now virtually belonged to his overlord. Feudalism meant division of the sovereign authority amongst the land barons and consequently petty conflicts and despotism.

But while the invasions caused immediate material destruction and superposed a polity actively opposed to commerce, they were also a regenerating influence to society. In the general disorder the need of mutual protection gave rise

⁵ The task of compilation was intrusted in 528 by Justinian to Tribonian. In 529 appeared the Code, a collection of the texts of all documents issuing from the Emperors during the five preceding centuries, creating, declaring or modifying the law. The Digests appeared in 533, a collection of the writings of the greatest of the Roman jurists. In the same year the Institutes were published, an elementary text book on Roman Law. In 534, a new edition of the Code appeared and later the Novels or legislation of Justinian posterior to the Code. The Basilica, compiled by the Emperor Basil in 877 and continued by the Emperor Leo in 886 and by Constantine in 910 superseded the Justinian collection in the Greek Empire.

⁶ Scherer, *Histoire du Commerce*; French translation by Riche-
lot and Vogel (1857), Vol. I. p. 150.

⁷ *Id.*, p. 142; Manzano, *Ob. cit.* Vol. 1. p. 192.

to the new agent of association, which, at first, helping to neutralize the prejudicial effects of oppression and despotism, later proved its independent value as an instrument for overcoming certain of the natural obstacles to commerce.

In the Germanic tribes the Church found a fertile field to plant the christian principles of peace, mutual respect, individual liberty, dignity of labour and education, all principles obviously helpful to commerce.⁸

The breakup of the Roman Empire put an end to a system of exploitation and to the deadening effects of centralization. The various impulses of the races that made up the Empire were liberated and henceforward followed their natural courses.⁹

The Crusades,¹⁰ by re-establishing relations between the orient and western Europe, had as profound an influence upon the economic history of the 12th century as did the world discoveries upon that of the 16th.

The feudal landlords, in order to raise the necessary money to undertake such stupendous military expeditions, were obliged to sell or borrow on their lands and to make terms with the merchants of the cities. In this way there was a levelling between the feudal barons and the city merchants to the advantage of the latter, and between landed estate and personal estate. Again, the loss thus suffered by the nobles generally redounded to the gain of the Crown, since the lands frequently returned to the Crown while the leadership of the crusades, being nominally or in fact in the Kings, strengthened their prestige and authority.

The Crusades furnished influences more directly favourable to commerce. The Italian cities and Constantinople supplied transport and munitions to the crusading armies. These returning from the east, introduced into Europe taste for articles of eastern civilization. All parts of Europe and Asia Minor became mutually acquainted. Impetus was given to ship building, processes in fabric and metal working were introduced from the east, and useful plants such as corn. The growth of the commerce of the Italian Republics was due to the impulse imparted by the Crusades. Afterwards they

⁸ Manzano, Ob. cit. Vol. I, p. 204-209.

⁹ Scherer, Ob. cit. Vol. I, pp. 141.

¹⁰ Dates of the Crusades: I. 1096-1099; II. 1147-1149; III. 1189-1192; IV. 1200-1204; V. 1217-1221; VI. 1228-1229; VII. 1248-1254; VIII. 1270.

continued to act as intermediaries between the east and the west.¹¹

Feudalism was characterized by small despotisms. There was but one way for the lower units of society to meet the oppression from above and that was by association. The towns became the focus of associated resistance and profiting by the absence of the feudal lords on the Crusades, they declared themselves self-governing communes. The sovereigns, often over-shadowed by their liege barons, were not unwilling to second the efforts of the cities. The revolution of the communes¹² was a movement in opposition to feudalism and favourable centralized authority and as such was helpful to commerce. The citizen of the commune was freed from his feudal obligations. The newly acquired autonomy was a stimulus to self-development and the most natural means of self development of the municipality was industry. Thus in the cities grew up the Third Estate.¹³

The religious festivals attracted great numbers of visitors to the cities and offered special opportunities to the merchants to dispose of their goods. In this way originated the mediæval fairs. Numerous measures were taken to encourage them and they naturally became most important centres of development of commercial custom, notably in respect to bills of exchange and the sanction attaching to contracts.¹⁴

To protect the degree of independence which they had won, and to secure an outlet for their industry by rendering travel safer and by assuring greater respect for the life and property of their citizens abroad, the merchants of a town who carried on the same trade organized into corporations. Similarly groups of cities having common interests organized into leagues.

During the middle ages the Jews were the most active, ingenious and numerous of the merchant class. Driven from Jerusalem by successive conquests, they penetrated every country. Personal property was the only form of wealth which they were permitted to acquire and they turned to trade as the only occupation left open to them.¹⁵ The canon

¹¹ Manzano, *Ob. cit.* Vol. I, p. 211.

¹² From the VIIIth to the XIIth century.

¹³ Manzano, *Ob. cit.* Vol. I, p. 209.

¹⁴ *Id.* p. 207; Scherer, *Ob. cit.* Vol. I, p. 148; Lyon-Caen et Renault, *Traité de Droit Commercial*, 4th Ed. Vol. I, § 20 and authorities cited.

¹⁵ The pre-Christian history of the Jews shews them to be an agricultural and theocratic people little given to commerce, *Encyc. Brit.*, Vol. 6, "Commerce."

law rule forbidding christians to exact interest did not apply to them.¹⁶ Their dispersion all over Europe and the close racial ties they maintained gave them a knowledge of geography and a mutual support not possessed by others and made them ideal intermediaries. The danger to which they were continually subjected of having their property confiscated led them to reduce their wealth to the most transmissible form possible and to take advantage of such means as the bill of exchange.¹⁷

Having glanced at the main influences that were affecting commerce the task is now to examine the working out of those influences in the four spheres of activity in which commerce awakened, namely (1) the Italian cities; (2) the Hanseatic League; (3) Marseilles and France; (4) Barcelona and Spain.

On the fall of Rome communication between the orient and western Europe ceased. As a policy of protection the Greek Empire isolated itself, and it was the Crusades that re-established the old relations. To this is due the revival of western Europe, and for several reasons Italy was the first to experience the change. Above all her geographical position placed her in the natural path of the crusaders, and of trade between occidental Europe, Constantinople (to which flowed the products of Asia Minor and the countries bordering the Black Sea) and Alexandria (the western terminal of the route to India via the Nile and the Red Sea). Her cities, mostly of Roman origin, maintained the traditions and germs of Roman municipal government which early gave to the citizens the ambition and the power to emancipate themselves from feudalism. Their liberty led them to turn to prosperous account their naturally industrious traits and the salubrious climate and productive soil of their country.

When the first Crusade moved toward Jerusalem, Venice and Genoa, along with Constantinople, were the only cities which could furnish the needed transport and supplies. Venice was particularly favourably conditioned. Founded in the 5th century on a group of islands in the Adriatic Sea as a refuge from the barbarians, her security from attack procured her a continuity of development. It is probable that even during the darkest years Venice traded with Egypt and the Greek cities. By the 11th century she was already

¹⁶ Scherer, *Ob. cit.* Vol. I, p. 181.

¹⁷ Lyon-Caen et Renault, *Ob. cit.* Vol. I, §21.

strong and had little to oppose her outside of Italy. Spain was engaged with the Moors, France had not yet awakened, the beginnings of the Hanseatic League were confined to the northern waters, the Dutch and English power were still centuries off. The assistance rendered by Venice to the crusaders in the capture of Constantinople in 1204, assured her the monopoly of the eastern trade; in the 15th century she had reached the apogee of her career and had crushed her rivals, Genoa and Pisa.¹⁸

But the great object of the Crusades failed of consummation. The christian kingdom of Jerusalem proved transitory and the christian zeal was more than matched by that of the Mahometans. Mediæval commerce was one of give and take between orient and occident. Through Asia Minor or Egypt lay the route to India and both countries were a rich source of products. The advance of the Mahometan conquests brought the Venetians and other Italian cities into conflict with them. As the Moors, Algerians and Turks swarmed about the Mediterranean, communication with the near and far east became more and more difficult and costly. In 1453 Constantinople fell. Meanwhile the compass had appeared and the kingdoms of Portugal and Spain facing the mysteries of the Atlantic had launched the voyages of discovery that proved the final blow to Italian supremacy.¹⁹ In the two years, 1497 and 1498, Vasco de Gama reached India by the Cape of Good Hope, Columbus discovered South America and Cabot North America. So long as commerce was restricted to the Mediterranean Venice was in a position to remain the mistress. When the ocean routes were discovered her natural advantages vanished.

In the northwest of Germany, and along the Rhine, Charlemagne had contrived to stimulate an interior commerce. Genoa and Venice, using the old Roman roads across the Alps, commenced to traffic with these cities, eventually reaching northern France, Flanders, northern Germany and England. In the markets of Antwerp and Bruges, the Italians laid the basis for the mercantile prosperity of the low countries, which were as favourably situated in the north as Venice and Genoa in the southern waters.²⁰

¹⁸ Manzano, Ob. cit. Vol. I, p. 194 *et seq.*, Scherer, Ob. cit. Vol. I, p. 156.

¹⁹ Schrader, *Geographie historique*, Carte 26, note by Blondel.

²⁰ Scherer, Ob. cit. Vol. I, p. 158.

The Hanseatic League distributed the products of Russia, Scandinavia, Germany, Flanders and England throughout Europe.

The term "hanse" is gothic and means a religious and military association. The Hanseatic League was a loose association of cities of different and widely scattered nationalities. The purpose of the League was to provide a defense against the pirates of the northern seas and to establish foreign markets. Such a German association had been established as early as the 10th century in London and developed under favour of the English kings. In 1153, Henry II. accorded privileges to the German merchants. In London, the seat of the association, was the Guild Hall which later became the nucleus of the Steel Yard. To that of London were closely allied similar associations of German traders in Lyn, Boston, York, Bristol, Ipswich, Norwich, Yarmouth and Hull. In the Baltic Sea, Wisby, on the island of Gothland, became a great centre for the distribution of goods. The Hanseatic merchants penetrated to Novgorod in Russia, and in 1158 they founded Riga. From 1226, Lubeck became the leading city of the Hanse. The most important cities were those along the coasts of the North and Baltic seas. They extended besides to Saxony, Westphalia, Brandenburg and Thuringia. Their fleets cleared the northern seas of the Viking pirates and secured a monopoly of the Baltic trade. The members of the league enjoyed exemptions from tolls, rights of escort and privileges of jurisdiction. Their principal activity was the establishment of foreign markets for the display of their wares. A distinct part of the town was frequently given over exclusively to their stores. An officer of the league was in charge and acted as intermediary between the merchants and the municipal authorities.²¹ Such were the Hanseatic markets of Bergen in Norway, Breslau in Silesia, Cracow in Poland and Bruges in Flanders. So important was that of Bruges that it was divided into three sections representing geographical divisions of the league. By sea and land they acted as a sort of mutual protection society, and throughout Germany they strove to maintain peace.

The league early came into conflict with the established governments and the final defeat of the King of Denmark at the end of the 14th century brought it to the height of its

²¹ Lyon-Caen et Renault, *Ob. cit.*, Vol. I, § 19.

power both politically and commercially. Its form of government was dual. The central authority was never strong. While the individual cities retained a large degree of independence and issued regulations and laws of their own known as statutes, a central diet met at Lubeck periodically after 1260, whose laws bound the league as a whole and added immensely to its political authority.

The commercial activities of the Hanse merchants were surprisingly wide and varied. From the Scandinavian countries came hemp, pitch, fish products, salt, grains, hides, furs and lumber; from Riga and Novgorod the merchants pushed to the northern limits of Russia and Siberia in search of furs and even brought spices from China, which was reached by way of Siberia; from England came such raw materials as wools, lead, tin, iron, coal and lumber; the fabrics of Flanders were distributed all over Europe; from Bordeaux and La Rochelle came French wines, while Lisbon was a tap to India after the discovery of the sea route. Canals were built in Germany; fairs were established; processes were discovered for preserving meat which made its transportation possible.

The 15th century saw the league already on the decline. Its composition was too heterogeneous and could not be held together in the face of the growing sentiment of nationalism. Once the central authorities were better able to supply the necessary protection to trade the great motive for association disappeared.²²

The renaissance moved north and west from Italy and reached England late. Norman feudalism though it created a more refined and fastidious society retarded industry in England. The Italian and Hanseatic fleets had already grown to be too formidable competitors when English commercial activity did commence. The discoveries of the ocean routes and a new hemisphere caused at once the decadence of the Hanse and Italy and the rise of England.²³

Southern France and northern Spain woke to commercial activity shortly after the Italian revival.

During the middle ages, French commerce never attained the importance of the Hanseatic or Italian commerce. It was too shackled by feudalism until liberated by Louis

²² Manzano, *Ob. cit.* Vol. I. p. 199; Schrader, *Ob. cit.* Carte 26, note by Blondel; Sartorius, *Histoire des Villes Hanseatiques*, Vol. I; Worms, *Histoire commerciale de la Ligue Hanseatique*.

²³ Scherer, *Ob. cit.* Vol. I, pp. 167-169.

XIth. The Crusades offered Marseilles the opportunity to become a self-governing municipality and during her years of independence she rose to great commercial prosperity. When Charles of Anjou, King of Naples, deprived her of her independence, western Mediterranean supremacy passed to Genoa and even the trade of Montpeelie, Aigues Mortes and Avignon surpassed that of Marseilles.²⁴

Special influences were at work in Spain to make her history during the middle ages unique.

Following the Suevi, Vandals and Allains, the Visigoths in 416 founded a monarchy upon the highly developed Roman civilization. With the conversion of the Gothic King Ricaredo to Christianity a close union was founded between the Church and the State which endures to-day. In the 8th century the Moors invaded Spain²⁵ and those Christians who continued to offer resistance were driven back to the northernmost parts of Spain where the kingdoms of Leon, Navarre, Castille and Aragon gradually evolved. For seven centuries the war of reconquest was waged until Granada fell before the united crowns of Aragon and Castille. Even in Moorish Spain there was no long period of absolute tranquillity because of the wars between pretending caliphs.

While there was a certain parallel between the invasions of the Germanic and Slavic tribes to the north and of the Arabs of the south, one vast difference made the results of the two movements distinct. When the northern barbarians invaded Spain they destroyed a Roman civilization of six centuries duration; when the Moors entered Spain they erected upon the inferior Gothic civilization one of a much higher order. Under Abderrahman III, Spain supported agriculturally and industrially a greater population than at any time since, while the arts and sciences flourished as in no other part of Europe.

The development of the sciences by the Moors, the early centralization of power in the Christian Kings as a result of the reconquest and the geographical position of the Peninsula, particularly of Portugal which was unfavourably placed for Mediterranean trade, all contributed to the impulse towards the world discoveries.

²⁴ Manzano, *Ob. cit.* Vol. I, p. 201; Scherer, *Ob. cit.* Vol. I, p. 163.

²⁵ Battle of Jerez, 711.

The conquest and reconquest of Spain kept her from participating to any large degree in the Crusades and their influence was less felt there than in the rest of Europe. The continual state of war in the interior of the Peninsula was injurious to commercial development. The spirit of decentralization²⁶ reached its height before the tide had turned in favour of the Christian reconquest. A common military and religious fervour then worked to weld the elements together. When the reconquest was complete the authority of the crown was already too absolute either for feudalism to flourish or for the municipalities to emancipate themselves.²⁷ But the great catholic kings that followed attempted, as it were, to run the ship of state at high speed on dead steam. When the Moors and Jews were driven from Spain the strength of the agricultural, industrial and trading elements was broken and the gold and silver from South America could not save her.

The Moors were never great navigators and in the southern ports of Almeria, Malaga, Seville and Cadiz, the ships of Christian Spain, from Barcelona and Tarragona on the east and Bilbao on the west were often seen trading with the Barbary States.²⁸ Seville became a center of immense commercial activity and when the city was captured by the Christians her commerce ramified throughout the whole peninsula.

In the north the interior commerce centred about Burgos and the fairs of Medino del Campo and Santiago de Compostella. The arms of Toledo and the linen fabrics of Segovia became famous.

In the east Barcelona, Tarragona, Tortosa, Valencia and the Balearic Islands were the centers of the commercial revival. In this Barcelona easily excelled. Here originated the greatest of the mediæval maritime codes, known as the Consulate of the Sea.²⁹

In the northwest the cities of Bilbao and San Sebastian carried on a thriving fishing and mineral trade with Bordeaux, Nantes and La Rochelle.

Before considering the production of commercial law during this period, that is from the fall of the Roman Em-

²⁶ Martin Hume, *Hist. of the Spanish People*, Chap. I, attributes this spirit of decentralization which has played so important a part in the history of Spain, to ethnic causes.

²⁷ Manzano, *Ob. cit.* Vol. I, p. 264 *et seq.*

²⁸ Scherer, *Ob. cit.* Vol. I.

²⁹ *Id.* p. 120; Manzano, *Ob. cit.* Vol. I, p. 202.

pire to the world discoveries, it will be well to make a resumé of the main influences upon and movements of commerce.

The Greek empire lasted long enough to preserve the spark of the revival of western Europe which had felt the obliterating effects of the barbarian migrations. In the chaotic state of feudal warfare that followed commerce came almost to a complete standstill save for necessary local trade and some activity in Venice, Marseilles and the German cities. The interrupted relations between the orient and western Europe were resumed through the crusades. A sense of nationality had not yet awakened and when the intellectual revival of the 11th century was reflected in an energetic trade revival in the 12th it is found to be regional and racial rather than national. The Italian merchants put Europe into communication with the near and far east; the Hanseatic League were the northern traders; the Provençaux, Catalans, Cantabrians and Moors were the merchants of southwestern Europe; the Jews penetrated everywhere.

During the period of the prostration of commerce the activity of the law makers was directed to the codification of existing law. Such were the codes of Justinian and the Emperor Basil.

The Visigoths produced two codes: (1) the Breviary of Aleric, a codification of the Roman law of the period intended for the conquered Roman inhabitants (under the system of personal law) and containing a bare reference to maritime law;³⁰ (2) the Code of Toulouse, of Visigothic Law, intended for the conquerors and containing no reference to commerce.³¹ But the personal system of law did not last and in the reign of Egica (d. 701) and Witza appeared the code known as the *Liber Judicium*, or more commonly the *Fuero Juzgo*,³² a uniform territorial law the foundation of Spanish national law.

The unsubdued Christians, taking refuge in northern Spain from the Moors, formed into separate kingdoms and the reconquest had the double effect of winning back and unifying Spain. While decentralization was strongest there

³⁰ Los Códigos Espanoles (1847). Vol. I, Introduction, p. XV. The maritime law was the Rhodian law as introduced into the Roman Law.

³¹ Manzano, Ob. cit., Vol. I, p. 273.

³² Códigos Espanoles, Vol. I, Introduc. p. XXXIX. Test of *Fuero Juzgo*, p. 97.

developed what is known as the *sistema foral* by which the crown granted the privilege to a locality to be governed by its own ancient customs. Not only did each separate kingdom have its proper law (preserved to-day in the provincial *fueros*), but a large amount of autonomy was granted to the municipalities. The body of municipal concessions was known as the *Fuero municipal*. The first known is that of Leon, granted in the 10th century. They contain little private law and so far as commerce is concerned have little importance save in the regulations of the merchants and the fairs.

So much for the period of the prostration of commerce. The period beginning with the revival is more fruitful.

The obstacles to land commerce, as may easily be imagined, were yet very great. The scarcity and the condition of the roads forbade long or heavy hauls. They were infested with robbers who not infrequently were the feudal lords themselves. The feudal system had so parcelled out the territory that one might pass through several sovereign authorities in a day's journey, each one exacting ruinous tolls.

It is not surprising, then, that the most important trade routes of the Middle Ages were by the then known seas. The Mediterranean and Hanseatic navies drove the pirates to the remoter parts. By sea carriage was not only speedier and cheaper, but the shipment of bulk was possible and trans-shipment less often necessary. Commercial law, the reflection of commerce itself, received its first great stimulus in the domain of admiralty. To Italy, where the revival first manifested itself, we must turn to examine the origins of commercial law.

The deficiencies of the existing Roman law were being constantly filled by a growing mass of customs. With the appearance of new forms of contracts such as negotiable instruments and insurance these customs became more than supplements to the common or civil law. They were often in derogation of it.³³ Meanwhile the course of Roman law was becoming unfavorable to commerce.³⁴ The Germanic

³³ Manzano, *Ob. cit.* Vol. I, p. 217.

³⁴ For example: (a) The *Lex Anastasiana* (Codex. 4. 35; Girard, *Droit Romain*, 4th Ed., p. 734) prevented the assignee of a contract right from recovering more from the debtor than he had paid the assignor. (b) A purchase could be rescinded for *lesio enormis*; (c) The joint debtor had a right to force a division of the debt amongst the joint debtors (Novels 99; Girard, *Ob. cit.* p. 741, note 2); (d) The co-surety had the right to divide the joint debt among the sureties surviving when the debt fell due whether or no they were solvent. (Gaius, 3, 121; Girard, *Ob. cit.* p. 749, note 2 and p. 755; Weakening of the probative force of written admissions of loans.)

feudal law was equally so and the canon law prohibiting the exaction of interest was another impediment.

In Italy particularly the city's prosperity was one with its commercial supremacy. When the merchants succeeded in winning recognition as a professional class they were in a stronger position to force the government to yield them more and more autonomy. Moreover the state of society and of government in the 12th century was favourable to the rise of a special law. The country was divided into small independent units and society into well defined classes. Nothing was more natural than that a special class of society should appear entitled to a special law.³⁵

The merchants that practiced the same trade organized for purpose of mutual protection into corporations. The organization of the corporation was modelled after that of the municipality. At the head stood one or more consuls who, upon entering office, published an edict containing the industrial and judicial regulations to be enforced during their term of office. The corporation was otherwise governed by a council elected by a general assembly. The oaths of office, the edicts of the consuls, the acts of the council and general assembly and the decisions of the consular Courts were entered in books, called statutes,³⁶ by special officers called *statutori* or *emendatori*. At first all this material was simply entered chronologically. As reference to precedents thus became possible, it was natural that they should be gradually subjected to greater scientific discipline and order.

The Courts of the corporations were formed of the consul, a juris-consult and two merchants. The procedure was summary. Parties were not permitted to be represented by counsel. In general, there was no appeal, except in the more serious cases, where it was granted to a Court known as the *Sopraconsuli*, who were drawn by lot from a list of merchants (*matriculati*). In case the first decision was reversed a second appeal was held to the council of the corporation whose functions were limited to deciding which of the two opposing previous decisions should stand.

³⁵ Cossack, *Traite de Droit Commercial*. French trans. from the German. Vol. I, p. 11; Mitchell. *Essay on the Early Hist. of the Law Merchant*, 1904, p. 55.

³⁶ Manzano, *Ob. cit.* Vol. I, p. 218; Lattes, *Studi di diritto statutario*, Milan 1887; Id. *Il diritto commerciale nella legislazione statutaria della città italiane*. § 1 *et seq.*, Milan, 1814; Goldschmidt, *Universalgesch.* § 7.

The consuls and *sopranconsuli* were merchants who decided the cases in accordance with the statutes and their own experience as merchants. The *emenzatori* were merchants as were the members of the general assembly which approved the statutes and gave them sanction. The new law, consequently, rapidly reflected the advance of commerce.

In the consular Courts the authority of the statutes was higher than that of the civil law. When the statutes were silent, recourse was had to mercantile custom and then in turn to the civil law, civil custom, and equitable principles.

As a general rule the authority of the consular jurisdiction did not extend beyond those merchants inscribed on the rolls of the corporation. Jurisdiction was based upon the mercantile status of the litigant and not upon the nature of the act. But the corporations became powerful enough to usurp the functions of the civil authorities. The special aptitude of the commercial Judges gave them a reputation which induced even those who were not under the authority of the corporation to voluntarily submit their differences to them. The clergy, nobles, and foreigners who were engaged in commerce, but could not be enrolled as merchants of the corporations, deemed it advantageous to submit their cases to the special Courts. When this stage was reached commercial law passed from its first stage, or purely subjective period, that is to say when jurisdiction depended solely upon the profession of the litigant, to the objective period when the act was separated from the actor, and afforded jurisdiction by virtue of its own inherent character. By the middle of the XVth century the city government recognized the commercial jurisdiction, giving it official character and sanction.³⁷

It was inevitable that the authority of the state should eventually extend to the consular Courts. The taking over of this jurisdiction, however, did not occur till the Middle Ages were passed.

So arose the dual jurisdiction.

Similar association arose in cities where the foreign merchants of one nationality were sufficiently numerous to organize and procure treaties by which the protection of their

³⁷ Vivanti, *Traite de Droit Commercial*, French Translation from the Italian. Vol. I, p. 4 *et seq.*; Cossack, *Id. cit.* Vol. I, p. 13; Mitchell, *Ob. cit.* pp. 28 and 40; Manzano, *Ob. cit.* Vol. I, p. 218, and the numerous authorities cited in all these.

interests was intrusted to an officer known, by analogy, as consul. Sometimes he was named by the home city, sometimes by the foreign resident merchants themselves. In this way originated the consular service.³⁸

The organization of the corporations of merchants laid the foundation of the law associations; the bill of exchange appeared solving the problem of the transport of money;³⁹ banks of discount and deposit shortly followed; the relations of employer to employee were regulated and the latter were forbidden to carry on trade on their own account; book-keeping was made obligatory upon merchants and the book entries were given particular probative force; the public debt was made transferable; finance rose to a science.⁴⁰

The statutes of Marseilles are one of the principal sources of the history of French commercial law and particularly of French maritime law.⁴¹

From the XIIth to the XIVth century, especially in France, the fairs were a most fertile source of commercial custom. They stand out as administrative and judicial units in the troubled Middle Ages. The feudal lords named the officials (*maîtres des foires, custodes nundinarum*) and frequently clothed them with full judicial authority over all questions arising in the fair. In France, Germany, England, and Italy, the commercial jurisdiction of the fairs was established by the XIIIth century and the special nature of the jurisdiction had its due effect upon the special nature of the law. They were centers where periodically came vendors and purchasers from all parts of Europe and the form and interpretation of their contracts became commercial custom. Bills of exchange were discounted and money exchanged; merchants settled their accounts and the assignment of contract rights received attention; procedure was so summary as to be known as *de hora in horam*; bankruptcy was

³⁸ Noel, *Hist. du Commerce*, Vol. I, p. 161; Dalloz, *Repertoire*, Vol. 12, p. 253 *et seq.*

³⁹ The bill of exchange having been evolved to avoid the transport of money, which was both difficult and dangerous at this period, for a long while it could not be drawn and made payable in the same place. By the new Art. 110 of the French Commercial Code this was made possible in France in 1894.

⁴⁰ Cossack, *Ob. cit.* Vol. 1, p. 14; *Encyc. Brit.*, Vol. 6, "Commerce."

⁴¹ The earliest known of the statutes of Marseilles is that of 1253, which, however, is a revision of an earlier. Desjardins, *Introd. hist. a l'étude du droit com. maritime*, p. 49.

regarded as one of the ways by which the state of being a merchant might be extinguished by law; agency was being slowly worked out,⁴³ the law of bailment, carriers, surety, and association were developing, but above all the law of sales.

In the Hanseatic cities the customs of each city were being reduced to written statutes. The first were those of Lubeck (1158). Of almost equal importance were those of Hamburg, Bremen, and Riga. Their merit was such that they came to be accepted by the other cities of the League.⁴⁴

By the XIIIth century, the time had come when the multiplication of local statutes was such that greater unity, order, and certainty became the needs of commerce. Besides the countless number of statutes of the corporations there were the statutes of each municipality, characterized by local prejudices and generally written in Latin. Maritime law had always been looked upon as a special field distinct from that of the civil law. Merchants trading by sea from different countries came into mutual contact without having the advantage of an accepted and unified jurisdiction such as the fair supplied. The need of a unified law was first felt upon the sea.⁴⁵

Three codes of maritime law appeared during the Middle Ages and they form the pedestal of the modern law. In none of them was there any evidence of scientific treatment. Little regard was paid to logical development or grouping of ideas. Provisions, while of merit, followed one another more or less at haphazard. However, the soundness of the law and the security obtained by the unification of a multitude of local statutes were so obvious that they were rapidly accepted over large areas, though more often than not they had no political sanction. Their acceptance was another evidence of the regional and racial character of commerce in the Middle Ages. There were in fact no great states which could give sanction to laws over wide areas. The initiative of the merchant had not only to meet the problem of his commerce, but also those of his regulation and protection.

⁴³ Because of the absence of postal facilities and of a law applying to and protecting foreigners, the merchant either traveled himself with his goods or established permanent houses abroad. Scherer, *Ob. cit.* Vol. I, p. 155.

⁴⁴ Manzano, *Ob. cit.* Vol. I, p. 224, and authorities cited there.

⁴⁵ Lyon-Caet et Renault, *Ob. cit.* Vol. I, § 22; Manzano, *Ob. cit.* Vol. I, p. 233.

The precise dates and the manner of confection of these codes remain in doubt.

The Consulate of the Sea, as was called the most important of these codes, appeared in the Catalan language in Barcelona probably in the XIIIth century and not later than the second half of the XIVth. As to its author, different historians have surmised that it was ordered by the King of Aragon,⁴⁶ or that it was the work of several jurists,⁴⁷ or that it was the product of one mind.⁴⁸ Of the 334 articles which composed it, 252 relate to substantive maritime law and the remainder are provisions of public law and procedure. The Consulate of the Sea was accepted as the common law of the whole Mediterranean and received early translations into Spanish, Italian, French, Dutch, and German.

The Rolls or Judgments of Oleron were law on the Atlantic coast. They are not supposed to be earlier than the XIIth century nor latter than 1263, the date of the Siete Partidas of Alfonso X, of Spain, which seems to make mention of them.⁴⁹ They were written in French and from their name are believed to have originated on the island of Oleron, which lies off the west coast of France, between La Rochelle and the mouth of the Gironde. The word *rolls* meant a parchment record of a judgment of a Court. It is therefore believed that the code was simply a collection of precedents, made by an unknown hand. They were accepted as law in England, Aquitania, Brittany, and Normandy, and are important as a source of French maritime law. No logical order appears in the 25 original articles nor in the 55 which are published in the later editions.⁵⁰ Two important Dutch translations of the Judgments of Oleron were known as the Judgments of Dam and the Laws of Westchapel.

The third of the codes was called the Laws of Wisby⁵¹ and was probably compiled towards the end of the XVth

⁴⁶ Emerigon, *Traite des assurances*, p. VI.

⁴⁷ Manzano, *Ob. cit.* Vol. I, p. 240.

⁴⁸ Pardessus, *Us et coutumes de la mer*, Vol. II, p. 19; for the text of the Code p. 361 to 368.

⁴⁹ Manzano, *Ob. cit.* Vol. I, p. 246; Pardessus, *Ob. cit.* Vol. I, p. 301, dates them anterior to 1152 when by the marriage of Eleanor of Guienne to Henry II of England, Aquitaine passed to England. For text see the same author, *Lyon-Caen et Renault*, *Ob. cit.* Vol. I, § 24.

⁵⁰ *Id.* p. 252. Of the later editions, eight articles are supposed to be of English origin. The first known manuscript editions are those of Oxford and of London.

⁵¹ Pardessus, *Ob. cit.* Vol. I, pp. 443-444; Manzano, *Ob. cit.*, Vol. I, p. 254; *Lyon-Caen*, *Ob. cit.* Vol. I, p. 24.

century at Wisby on the island of Gothland, in the Baltic Sea. It is doubtful what original authority the code had beyond general acceptance by the merchants. It contained little new material, the 72 articles being compiled from the Statutes of Lubeck, the Judgments of Oleron and the Maritime Uses of the Northern Low Countries, which in their turn were virtual translations of the Judgments of Oleron. The Laws of Wisby were of great importance in the Scandinavian countries and the Hanseatic League. They were first published in German, but passed through numerous editions and translations.

In Spain, during the middle ages, we have already seen that special influences were at work making her political and industrial history markedly different from the rest of Europe. The Consulate of the Sea was the most important body of codified law belonging to the middle ages; an edict of Barcelona of 1394 contains the first mention of bills of exchange in Spain; an ordinance of the same city in 1435 mentions bottomry and in the same year the first mention is made of insurance, neither subject having been regulated in the Consulate of the Sea; in 1226, King James I, of Aragon, granted privileges to the city of Barcelona regarding the naming and the functions of the consular Judges; in 1283, Peter III established the consular jurisdiction in Valencia; from 1336 to 1348 was regulated the procedure to be followed in the consular Courts of Barcelona, Valencia, Palma de Mallorca and Perpignan.⁵²

In the interior the *fueros* had reached extravagant importance and with the termination of the reconquest and the political unification of the Peninsula efforts were made by the sovereigns to unify the law. King Alfonso X, of Castille (1252-1284), issued two codes: (1) the *Fuero real*,⁵³ reflecting closely the national law, and (2) the more famous *Siete Partidas*,⁵⁴ which borrowed generously from foreign and Roman law. From the point of view of commercial law, the latter code is the more important.

In the northwest the Rolls of Oleron were in force and in 1459, appeared the first of the *Ordenanzas de Bilbao* in which brokerage is minutely regulated.⁵⁵

⁵² Manzano, *Ob. cit.* Vol. I, p. 276.

⁵³ *Códigos Españoles*, Vol. I, p. 349.

⁵⁴ *Id.*, Vol. 2.

⁵⁵ Manzano, *Ob. cit.*, Vol. I, p. 281.

SUMMARY OF COMMERCIAL LAW IN THE MIDDLE AGES.

"The Law Merchant was a body of rules and principles relating to merchants and mercantile transactions, distinct from the ordinary law of the land. Possessed of a certain uniformity in its essential features, it yet differed on minor points from place to place."⁸⁸

Its principal characteristics were that it was customary, summary, equitable and international.

The customs of the commercial classes, preserved in the statutes of the corporations of merchants and of the municipalities, had authority over very limited territories and were so numerous as to be confusing. The great maritime codes brought some order out of the chaos in their particular field, though their authority was probably simply public acceptance. The hostile occupation of the African and Asiatic shores of the Mediterranean by the Arabs obstructed the route to India and, with the advent of the compass, led to the discovery of the ocean route to India and a new hemisphere and the decline of Italian and German commerce. In the period to the French Revolution commercial supremacy passed to new nations more favourably situated to carry on a world trade. National consciousness and national law were born.

LAYTON B. REGISTER

University of Pennsylvania Law Review.

⁸⁸ Mitchell, *Ob. cit.* p. 10.

THE POLICE POWER.

BY HON. ANDREW J. COBB, OF THE ATHENS, GEORGIA, BAR.
FORMER PRESIDING JUSTICE OF THE SUPREME COURT OF GEORGIA,
LECTURER ON CONSTITUTIONAL LAW. LAW DEPARTMENT UNIVERSITY
OF GEORGIA.

The three indispensable powers of government are the taxing power, the power of eminent domain, and the police power. Government owes its life to the first, its ability to perform its functions to the second, and its orderly continuance to the third. Property is either taken or damaged when any one of these powers is exercised, but Government never takes or damages property without compensation. The citizen cannot be required to surrender anything that he may own to the Government without something being given in return by the Government. The compensation given by the government is not the same in all cases. The manner in which it is given varies in different cases where a Government sees proper to require of the citizen some portion of that which he owns and possesses. When the power of eminent domain is exercised the compensation is in money. When the citizen is deprived of property or a property right under the taxing or police power, the compensation received by the citizen is protection, health, peace, order, and the like. The line of demarcation between these powers is sometimes difficult of ascertainment, though the line between the power of eminent domain and the taxing power is more capable of exact designation than the line marking the difference between the power of eminent domain and the police power. One of the powers may be, for its complete exercise, dependent upon one of the others. The police power is sometimes dependent upon the taxing power. An inspection law, so far as it relates to the matter of surveillance of the business of a citizen, has its foundation in the police power, but the fees which the citizen is required to pay to the inspector are really collected under the taxing power. Each of the powers is inherent in Government. The limitations that may be placed upon the exercise of any of them are to be found either in constitutions or statutes. The exercise of each must be derived from a legislative enactment, and the legislative enactment must be within the prescribed bounds of the constitution. When there is no limit fixed in the constitution, the question as to the limit and extent of the power is to be answered primarily by

the Legislature. Where the constitution has spoken in reference to the subject, the question as to whether the legislative enactment is within the bounds of the constitution is for determination by the Courts.

The police power as to its limits and extent is undefined and indefinable. This is so from necessity. It is through the exercise of this power that we have a guaranty of health, peace, order, and all of those things which make life and its enjoyment possible. The police power may have to be called into exercise in what may be considered the more trivial affairs of life, as well as in those of gravest importance. It is the power which can require the careless citizen to bury a dead fowl upon his premises. It may regulate men of the learned professions in the exercise of the duties of their professional calling when it relates to the health or property of the citizen. It may regulate the great carriers of the world as to the manner in which articles which are dangerous to life may be transported, and prohibit the carriage of those that are a menace to health. By it the limb that overhangs the highway may be cut off, and the edifice may be destroyed to prevent the spread of a conflagration. In its exercise the harmless drunken person may be removed from the street, and the place at which he secured his liquor in violation of the law may be closed. We may obtain a view of the extent of the power by illustration, but its extent cannot be compressed within the bounds of a definition. The beneficent effects that result from its exercise are largely due to its indefinable character. There are some things which the law cannot afford to define. The moment that accurate definition appears, the hands of a wrongdoer are sometimes unloosed.

Is the police power then an arbitrary power? By no means. Its exercise is subject to limitations in the constitution and is also subject to limitations by the Legislature, and the enactment of the Legislature is subject to review and revision by the Courts. The Legislature may prohibit those things which are prejudicial to the welfare of the public, or it may command those things which are promotive of the general welfare.

At last, however, what is or what is not in the domain of the police power is a judicial question.

What would not be a legitimate exercise of the power in one territory might be a necessary exercise in another. What

would have been considered an unauthorized exercise in an age that has passed may be a necessary exercise in a subsequent age. Its exercise depends upon general conditions, as well as local conditions. Changed conditions may make that necessary which under former conditions might have been properly held to be arbitrary.

The power has been coexistent with government itself. The extent of its exercise broadens or lessens as conditions change. The existence of the power, its indefinable character, the delicate task of declaring when its exercise is arbitrary or when property and personal rights are unduly interfered with, emphasizes the importance of an honest, intelligent, and independent judiciary, and is an answer to those who would make the judiciary subject to the possible influence of popular prejudice and caprice.

To the judicial department of the Government is, therefore, committed the grave and important duty of deciding from time to time, whether that which purports to be in the interest of the general welfare is really such. Such a power should be confided to men of character, men of learning, and men who are fully abreast of the times in thought. The precedents of the past may sometimes have to be disregarded on account of the conditions of the present. One who is not thoroughly imbued with the view of the present in regard to matters which must be considered in the determination of this question is not well qualified for the exercise of the duty of determining the scope of this power. The one who has this responsible duty must not be ultra-conservative so as to cling with undue tenacity to the past. On the other hand, he must not be ultra-progressive so as to declare that within the power when conditions have not arisen that would justify such declaration. If the Judges in whom this power resides are elected by a popular vote the insidious influence of such method of election is bound to have its effect, and in determining the scope of the police power popular prejudice may find an expression either too much limiting it or giving to it too broad scope. If the Judges are chosen by the vote of the Legislature the evils of popular election are to some extent lessened, though they are still present in a degree. The chief executive of a state is one who should be, and generally is, abreast of the times in which he lives, and to him may be confided the selection of these officers with more confidence

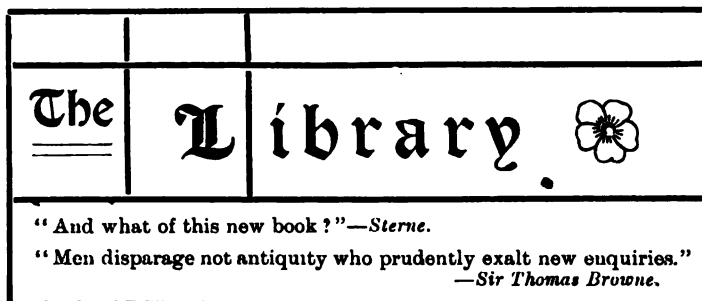
of satisfactory results than any other method that has been adopted. It is true that this reposes the selection in a single person. This is one of the strongest reasons for this method of selection. He can be held responsible for a selection that was unwise or improper. The voters at the ballot box are an irresponsible mass. The voters in a Legislature are a smaller mass, but there is a divided responsibility among a large number. The executive, the single person charged with a grave duty, can be identified and held responsible for his acts. The consciousness of this will generally bring him to the discharge of this duty in a state of mind where he will realize the gravity of the situation by which he is surrounded.

I was requested to write an article upon one phase of the police power, and I have digressed into a discussion of the method of selecting Judges. The digression was easy, and I think it was logical. The manner of selecting those who are to determine the extent of the power is certainly a phase in the discussion of the power itself. However, let it stand as a digression. Sometimes that which is said in a digression is of more importance than what is said in a discussion of the main question, just as what is said in an opinion by way of *obiter* is sometimes more lasting and of more importance than what was said in the direct discussion of the main question.—*Case and Comment.*

MR. LLOYD GEORGE'S PROPOSALS.

How eager is officialdom to extend its borders is indicated by the proposals put forward by Mr. Lloyd George in his speech at Swindon recently. A Ministry of Land is to be created, to which the existing functions of the Board of Agriculture are to be transferred, and a number of new duties, including the control of all matters relating to the registration of title and land transfer, are to be assigned. If these matters are to be the subject of official supervision, something may, no doubt, be said in favour of bringing them under the management of one central body. But the proposals of the Chancellor of the Exchequer go far beyond this. The administration of the law respecting settled estates is to be taken from the Court of Chancery—where at present all the questions within its province are dealt with expeditiously and inexpensively—and transferred, with such matters as the revision of notices to quit, the reduction of rents, and the fixing of the price of land required for public purposes, to a body of Commissioners through whom the powers of the new Ministry are to be operated. The Commissioners, though they are to act ‘judicially’ are not to sit in Courts.

‘We are going,’ says Mr. Lloyd George, who never loses an opportunity of gibing at his old profession, ‘to keep the lawyers outside.’ In other words, the mischievous policy of the Government to interfere with access to the Courts is to receive a large extension, and a new Department, free from the good influence of public criticism, is to be established to deal with matters which the Judges are accustomed to decide in open Court. The officialism of the Land Registry is to be transformed into the despotism of a larger Department, and the encroachments of the Executive upon the province of the Law are to become yet more dangerous.



Canada's Federal System. By A. H. F. Lefroy. Toronto: Carswell Company, Limited. \$10.

This book is not a new edition of Mr. Lefroy's earlier work, “Legislative Power in Canada,” published in 1898-9, but an entirely new book on the subject of Canada's great charter, the British North America Act as that Act had been interpreted in the light of the many appeals to the Privy Council at London, on constitutional questions. As the author very aptly points out, the federal system of Canada is unlike that of the United States as the powers of the Dominion Parliament are wider and fuller than those of Congress—more elastic, it being able to legislate on the various subjects set out in sec. 91 of the act and also as expressed in clause 29 of the same section relating to “such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the provinces. And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of matters of a local or private nature comprised in the enumeration of the classes of subjects by this act assigned exclusively to the legislatures of the province.”

The various sections of the British North America Act, which have been the subject of dispute are discussed in this volume in a particularly lucid and able way in connection with the cases in which the point involved came up for adjudication before the Privy Council.

A chapter is devoted to a comparison between the Canadian and United States Constitutions in which the difference existing between the two is explained. A first-class

index of the various acts which preceded the final passage of the British North America Act makes the book a valuable one.

It may be added that Mr. Lefroy's article on this subject which appears in the October issue under the heading "Points of Interest in Canada's Constitution" should be read in connection with this work.

The Canadian Law of Banks and Banking. By John Delatre Falconbridge, M.A., LL.B., of Osgoode Hall, Barrister-at-Law; One of the Lecturers to the Law Society of Upper Canada. Toronto: Canada Law Book Company, Limited. \$8.50.

This is the second edition of this work, and it appears at a very opportune time, when the new Bank Act has just come into force. The volume shews great care in the preparation not only of the acts dealt with but also in the presentation of the cases decided with reference to the various sections, in addition to which a comparison is made with reference to similar legislation in force in other countries such as the Negotiable Instruments Law in operation in many of the States of the American Union, so that the reader may have a full understanding of the working of the Canadian Act and be able to appreciate the differences between it and the several enactments with which it is compared.

Before presenting the subject-matter proper a brief history of the Law Merchant is given, detailing its subsequent incorporation into the Common Law. In the Bank Act, ch. 16, under the heading of Warehouse Receipts, &c., as Collateral Security, the new extensions of this section enabling farmers and others to obtain advances on threshed grain and other "products" is ably discussed.

Chapter 23 gives the Act by which the Bankers' Association justifies its existence, and in chapter 27 a clear exposition of the clearing-house and its methods is outlined.

Under the Bills of Exchange Act, ch. 31, p. 424, et seq. will be found the difference which exists between the English and Canadian Acts.

Rare ability, extreme care and attention to the most minute details is evidenced throughout the whole of this work and it will be undoubtedly appreciated not only by the legal profession but by all who may have occasion to consult

it. Mr. Eckardt's introduction is somewhat of an excrescence and may very profitably be omitted.

Chattel Mortgages and Bills of Sale. Second revised edition. By Barron and O'Brien. Toronto: Canada Law Book Company, Limited. 1914. Price, \$8.50.

This book, so useful to the ordinary practitioner, appears thoroughly revised and up to date both as to the revision in the statute law and the cases quoted as authority. The law on this subject is given in concise form under its various headings, the different points being supported by decided cases. Then follows the Money-Lenders Act, R. S. C. 1906, ch. 122, followed by the Bills of Sale Act of the various provinces. A complete set of forms is given which will be found most useful, in which the master-hand of Mr. A. H. O'Brien is apparent. The volume is a distinct addition to any law library.

Mechanics' Lien Laws in Canada. By William Wallace, LL.B. Editor of "Decisions of Supreme Court of Nova Scotia Hitherto Unreported" (40 N. S. R.); Ingpen on Executors and Administrators, Canadian Notes, &c., &c. Toronto: Canada Law Book Company, Limited. \$7.50.

This very complete work presents the law on what is often to the solicitor a very annoying subject, and the author has taken great care in collecting not only the decisions of the Canadian Courts but the recent decisions of the American Courts where similar legislation exists in the United States as that in vogue in Canada. The statutes of the various provinces are given and all the necessary forms appear at the end of the volume together with a full index.

Reference to this publication will undoubtedly save much time and worry, and very often time is limited.

The Examination of Witnesses in Court. By Frederic John Wrottesley, of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd.

Mr. Wrottesley's book will be found very valuable, particularly to the junior Bar in whose minds rules of examin-

ation have not become second nature. A perusal of this volume will undoubtedly save counsel many a hesitating and uncomfortable moment through uncertainty. The chapter on elementary rules of evidence is a distinct addition to a book of this nature and will without doubt be appreciated.

An Epitome of Leading Cases in Equity. Founded on White and Tudor's selection. By W. H. Hastings Kelke, M.A., of Lincoln's Inn, Barrister-at-Law. Third edition. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd., \$1.60.

This little volume will enable the beginner to obtain a thorough grasp of the principles of equity and to associate with the principles enunciated in the book the cases in which these principles are best exemplified. Although the book is not intended for old practitioners it will be found not only useful but accessible for ready reference to the established principles of equity.

The Law of Mortgages. By J. Andrew Strahan, M.A., LL.B., of the Middle Temple, Esq., Barrister-at-Law; Reader of Equity, Inns of Court, London; and Professor of Jurisprudence, University of Belfast. Second edition. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd., \$2.00.

In this work the author sets out the general principles underlying the law of mortgages, discussing its origin from the Common Law and the changes which Equity and Statute law have grafted upon it, making, as the author states, the Law of Mortgage consistent, simple, and reasonable. The most important statutes affecting the law of mortgages are appended and may be consulted to advantage.

Privileges and Immunities of Citizens of the United States. By Arnold Johnson Lien, Ph.D., sometime Richard Watson Gilder, Fellow in Political Science, Columbia University. New York: Columbia University.

This is one of the publications edited by the Political Science Faculty of Columbia University, and presents an illuminating discussion of the American constitution and the privileges of American citizens thereunder. The conclusions arrived at in Dr. Lien's publication are the result of great

and earnest labour and are based on the decisions of the Supreme Court of the United States.

Messrs. Carswell & Co.'s legal diary for 1914, also pocket diary, is to hand. The Bar will find this diary particularly useful in many matters requiring reference.

Browne and Watts' Law and Practice in Divorce and Matrimonial Causes. Eighth edition. By J. H. Watts, of the Inner Temple and the South-Eastern Circuit, Barrister-at-Law. London: Sweet & Maxwell, Ltd., Stevens & Sons, Ltd. Toronto: The Carswell Co., Ltd., \$7.25.

The present edition of this very useful work has been partially re-written and many important cases which have recently been heard included. The form of the previous editions has been adhered to, namely part one on Law and part two on practice. A number of other improvements are also to be found in this edition, namely the names of the correspondents, which enables the reader to ascertain whether the suit was a petition by husband or wife. The various statutes and rules are to be found in the appendices.

With the question of the establishment of a Divorce Court in Canada a moot one, the present volume will be found of great assistance not only to the profession but to parliamentarians.

FICTION.

The White Linen Nurse. By Eleanor Hallowell Abbott, with illustrations by Herman Pfeifer. Toronto: The Copp Clark Co., Ltd.

To those having personal knowledge of hospitals and nurses "The White Linen Nurse" will appeal in a way peculiarly its own. The three graduating nurses, room-mates, who with the senior surgeon are the principal characters of the book, are the millionaire city girl, the town girl and the country girl, and the three probably form as good an example of the girls from their respective walks of life who study nursing as could possibly be found. The char-

acters of the city girl and the town girl are well drawn and each plays up to her part, but the drawing of the White Linen Nurse, the country girl, is that of an artist and of one who knows. Overwrought with long hours of watching, overwork, and a succession of difficult and depressing cases, the day of graduation finds the white linen nurse suffering from a severe attack of neurasthenia in a peculiar form. Admitted by the senior surgeon to be not only the most capable nurse he had ever had but that he had ever seen, remaining cool and retaining her presence of mind in several most delicate operations when even the surgeon himself was far from cool, it will be understood that the nervousness is not the ordinary fool kind prevalent among a certain class of women, but the result of overwork and mental anxiety.

The subsequent working out of the story and the entrance therein of the senior surgeon and his little crippled daughter form part of one compact, artistic whole. The book is without doubt one of the season's best.

Notwithstanding. By Mary Cholmondeley. Toronto: The Copp Clark Co., Ltd.

This book contains subject-matter sufficient for a passable novelette but when the author endeavours to extend it to a book the dimensions of "Notwithstanding" it degenerates into drivel and sentimental rubbish.

The Port of Adventure. By C. N. and A. M. Williamson. Toronto: Musson Book Company, Limited.

This is a charming little love story from the pen of these well-known authors. The setting for the story is California and New York, with the Golden Gate in California as the Port of Adventure. The principal characters are Nick Hilliard, Carmen Gaylor, a Spanish creole, and Angela May, the daughter of a California millionaire who, when a girl, had been jostled into a marriage with an Italian prince now deceased. The characters are well drawn if somewhat stereotyped, and the gorgeous colouring of California and the west is brilliantly described. While not a particularly great book, the Port of Adventure will be good reading to while away an idle hour.

The Canadian Law Times.

VOL. XXXIII. DECEMBER, 1913. No. 12.

THE NEW LORD CHIEF JUSTICE.

With the cordial approval, not only of the members of the legal profession, with whom he is universally popular, but also of the public, who have long learned to appreciate his legal attainments and many qualities, Sir Rufus Isaacs has been appointed to succeed Lord Alverstone in the Lord Chief Justiceship, the highest purely judicial office in the land. During the past one hundred years the office of Lord Chief Justice has had eight occupants—Ellenborough, Tenterden, Denman, Campbell, Cockburn, Coleridge, Russell, and Alverstone—and not one of these distinguished men brought to it a larger store of professional and personal gifts. None of them, at any rate, reached it through a worthier or more romantic career. It is through sheer hard work, combined with forensic gifts of the highest order and personal qualities of a most attractive kind, that Sir Rufus Isaacs has won his way to the great position to which he has been appointed at the early age of fifty-three. He belongs to a race which has given the world some of its finest legal intellects. Sir George Jessel, whose name stands out pre-eminent in the list of modern Masters of the Rolls, was the first Jew to become an English Judge, and Sir Rufus Isaacs, who has been appointed to "the chair of Mansfield," is the second member of his race to become one of His Majesty's Judges.

About the early days of the Lord Chief Justice there was little, apart from his determination and independence, to suggest the achievement of his later years. A son of the late Mr. Joseph Isaacs, a member of a well-known London firm of fruit merchants, he was born on October 10, 1860, and was educated at University College School, at Brussels, and at Hanover. A spirit of adventure led him, soon after the completion of his schooldays, to abandon the comfortable

prospect of entering his father's office, and to obtain a berth as "boy" on a Scottish vessel, the Blair Athol, trading to Rio de Janeiro with coal. A year or so later, after he had endured, none too willingly, the hardships that belong to life before the mast, he went to Magdeburg as agent for his father's firm, and in this position, which he occupied for about two years he acquired a knowledge of mercantile life which was, no doubt, of considerable use to him when he started his career at the Bar. His subsequent experiences as a member of the Stock Exchange, though they did not immediately make for success, were equally valuable to him when he adopted the profession in which he was destined to rise to so eminent a place. It was in 1887 that, reading with the late Sir John Lawson Walton, he was called to the Bar at the Middle Temple. After a certain experience of County Court work, he quickly made his way into the foremost ranks of the Junior Bar, and in 1898, only eleven years after he was called, he was appointed a Q. C. From this point his career was extraordinary in its rapidity. At first his work as a leader lay chiefly in the Commercial Court, where the late Mr. Justice Walton, then the leader of the Court, was his principal opponent. It was in 1900, when Sir Edward Carson's appointment as Solicitor-General occasioned his withdrawal from the ordinary work of the Courts, that the new Lord Chief Justice leapt into that commanding position at the Bar which he shewed he was so well qualified to hold. His Parliamentary career began in 1904, when he was returned for Reading, the constituency for which he has continued to sit. His first appointment as a Law Officer was in the early part of 1910, when, upon the promotion of Sir Samuel Evans to the presidency of the Probate, Divorce and Admiralty Division, he became Solicitor-General. Some six months later, upon the appointment of Sir William Robson as a Lord of Appeal in Ordinary, he succeeded to the Attorney-Generalship, his tenure of which will always be notable because he was the first occupant of the office to be made a Cabinet Minister.

These are the main facts of the new Lord Chief Justice's career. The qualities by which he has gained so high a place in the most competitive calling in the world may be stated less baldly. Sir Rufus Isaacs did not achieve his forensic success by any extraordinary gifts of eloquence. He has not had at his command the polished rhetoric of a Coleridge or the

passionate oratory of a Russell. Not that he lacks the gift of impressive speech. Lord Bowen once described Russell as an "elemental force," and there have been occasions calling for some passionate note on which the phrase might not inaptly have been applied to Sir Rufus Isaacs. As a speaker, however, he has, except on very rare occasions, been content to be lucid rather than eloquent, persuasive rather than dazzling.

"Though deep, yet clear; though gentle, yet not dull;
Strong without rage; without o'erflowing, full.

His real strength as an advocate has lain in his swift and easy grasp of facts, in his unerring sense of what is essential and tactful, and in his remarkable powers of cross-examination. No advocate of modern times has shewn a readier skill in the handling of witnesses. Others may have been more dramatic in their methods, but none has used the art of cross-examination more effectively as a means of eliciting the truth. His style of advocacy, whether in addressing a jury in a sensational case or in arguing an important point of law before a judge, has been marked by a wholesome disregard of the pedantic and technical. He has always fought on the large points rather than on the small, and has conducted his cases with so fine a sense of fairness that, when he has triumphed, even the "ranks of Tuscany could scarce forbear to cheer."

With the Bar the relations of the new Lord Chief Justice have always been most happy. He has displayed a camaraderie which has made him immensely popular with all ranks of the profession. Even when the pressure of his enormous practice has been most heavy his cheeriness of mood and sense of comradeship, appreciated by the humblest junior no less than by his nearest rival, have never deserted him. Unlike the *serjeant* in the "Canterbury Tales," he has ~~seemed~~ *less* busy than he was, and has always found time for those little touches of intimate courtesy which make a great leader of the Bar so popular with his fellows. The affectionate regard in which the new Lord Chief Justice is held by the Bar has frequently been expressed by its leaders. Speaking at a dinner given in honour of Sir Rufus Isaacs when he was appointed Attorney-General Sir John Simon used these words: "It is his warm-hearted willingness to be friendly to his juniors, more than even his splendid qualities of intellect, which has caused his appointment as head of the pro-

fession to be welcomed by every member of the Bar." His doughtiest opponent, Sir Edward Carson, who was present on the same occasion, observed that Sir Rufus had always preserved the highest traditions of the Bar of England, and that, though he hit hard, he never hit below the belt. "The surest way of finding out whether a man is a good fellow," Sir John Holker once said to Lord James of Hereford, "is to see whether, after a hard day's fighting at *nisi prius*, you want to walk back from Westminster to the Temple with him." Sir Rufus Isaacs never had an opponent who did not desire to walk homewards with him. The warm tribute which Sir Edward Clarke paid to Sir Rufus Isaacs at the annual meeting of the Barristers' Benevolent Association is so fresh in the memory of the profession that it need not be further recalled. The high regard in which Sir Rufus Isaacs has been held by the Bench was fitly expressed by Lord Sumner of Ibstone at the recent Hardwicke banquet, when he described him as having uniformly shewn at the Bar "the ardour of an athlete and the spirit of a sportsman." The possession of the qualities to which these tributes have been paid—the unremitting industry, the large knowledge of legal principles, the ready grasp of facts, the innate sense of fairness, the serenity of temper and the dignity of demeanour which Sir Rufus Isaacs has always displayed at the Bar—makes it certain that he will worthily maintain the highest traditions of the historic office which he now fills.

The Law Journal.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

NOVEMBER 14TH, 1913.

TORONTO AND YORK RADIAL RAILWAY CO. v. CORPORATION OF THE CITY OF TORONTO.

Appeal was heard by THE LORD CHANCELLOR, LORD SHAW, and LORD MOULTON.

Sir Robert Finlay, K.C., C. A. Moss, and Geoffrey Lawrence, for the appellants.

W. O. Danckwerts, K.C., and Irving S. Fairty, for the respondents, were not called upon.

This is an appeal by leave of the Supreme Court of Ontario from an order of the Appellate Division of that Court, dated the 13th day of February, 1913, allowing an appeal from an order of the Ontario Railway and Municipal Board, pronounced on the 17th day of June, 1912, and setting aside such order. The history of the litigation in this matter is as follows:—

The Toronto and York Radial Railway Company is a railway company which, so far as is material to the decision of the present case, may be taken to be the successors in law to the Metropolitan Street Railway Company of Toronto, which was incorporated by an Act of Legislature of the Province of Ontario, passed in the 40th year of the reign of Queen Victoria, and chaptered 84, for the purpose of constructing, maintaining, and operating railways upon and along streets and highways within the jurisdiction of the Corporation of the City of Toronto, and of any of the adjoining municipalities as they might be authorized to pass along, under and subject to any agreement thereafter to be made between that company and the councils of the said city, and of the said municipalities, and subject to any by-laws of the same.

At the date of the passing of the said Act, and until the first day of January, 1888, the portion of Yonge street to which this case relates, was within the county of York, but by proclamation dated the 24th September, 1887, the boundaries of the city of Toronto were extended so as to

include a portion of such county, such proclamation to take effect from the 1st day of January, 1888. By virtue of such extension, almost the whole of the aforesaid portion of Yonge street became included within the boundaries of the city of Toronto, but a small portion at the northern end situated opposite to and to the south of Farnham avenue still remained within the county of York.

Prior to the above-mentioned extension of the boundaries of the city of Toronto, and while the said portion of Yonge street was still within the county of York, an agreement dated the 25th June, 1884, was made between the Municipal Council of such county and the Metropolitan Street Railway Company of Toronto. By the terms of that agreement the railway company obtained the right to construct, maintain, complete, and operate a rail track in, upon, and along the above portion of Yonge street, such track to be located and constructed on the west side only of the said street, according to plans to be approved. The company undertook to run at least two cars each way, morning and evening, on a regular time table at such times as would best meet the wants of the residents and the general public. The privilege and franchise granted by the agreement were to extend over a period of 21 years from its date, and subject to the observance of the conditions and agreements therein contained (which covered many matters not directly relevant to the present dispute), the company were to have the exclusive right and privilege to construct a street rail, or tramway in and upon the said portion of Yonge street. By a further agreement between the same parties, dated the 20th day of January, 1886, the privileges granted by the preceding agreement were confirmed and enlarged in various respects not relevant to the present case, otherwise than that, by clause 16 of this agreement, the privilege and franchise granted by it in the previous agreement were made to extend over a period of 31 years from the 25th day of June, 1884, so that they will expire in June, 1915.

It is solely under the two agreements above referred to that the Metropolitan Street Railway Company of Toronto acquired, and that their successors, the present appellants, possess the right to maintain and operate the street railway along the portion of Yonge street to which this case relates, and they are bound in respect of such privileges and franchise by all the terms and conditions of such agreements. Very

numerous Acts of Parliament (being either general Railway Acts relating to all railways in the province or special Acts relating to the appellant company or companies, of which it is the successor), were cited in the argument, but their Lordships are unable to discover in any of such Acts any legislative provision which exempts the appellants from the performance of the conditions of the agreements under which they have obtained these privileges and franchises which they still enjoy. According to the well-known principles of the construction of statutes, clear words are required to give to them a meaning which would interfere with existing contractual arrangements, and their Lordships are of opinion that so far as concerns the said privileges and franchises obtained under the said two agreements, such words are entirely absent in the present case. It is unnecessary, therefore, to examine in detail the portions of these statutes which were cited in argument, excepting so far as may be necessary to understand the decision of the Ontario Railway and Municipal Board, which formed the subject of the appeal to the Court below.

By an Act of 1893, the Metropolitan Street Railway Company of Toronto changed its name to the Metropolitan Street Railway Company, and by an Act of 1897, it again changed its name to the Metropolitan Railway Company, but such changes of name have no effect on the rights of the parties to this dispute. On the 6th day of April, 1894, an agreement was made between the Municipal Corporation of the county of York and the Metropolitan Street Railway Company, whereby, amongst other things, it was provided that the company might deflect its line from Yonge street and operate same across and along private properties, after expropriating the necessary rights-of-way under the provisions of the statutes in that behalf. At the date of such agreement, the county of York had no rights whatever in the portion of Yonge street to which the present dispute relates, except the small portion at the northern end hereinbefore referred to, and it is not contested that the agreement in question could not affect the rights of the appellants otherwise than with regard to such portion of their track in Yonge street as lay north of the then boundary of the city. But it is necessary to refer to this agreement, inasmuch as much reliance was put upon it as justifying the deviation from Yonge street, north of the city boundary. Their Lordships

do not feel called upon to decide whether, as against the municipality of the county of York, the appellants acquired the right to make the line in its new position, or whether its so doing would be consistent with their duties, or within their powers in other respects, because they are of opinion that nothing done under the powers of this agreement can in any way effect the rights of the respondents with regard to the portion of Yonge street owned by them and situated within their own jurisdiction.

On the 11th May, 1911, the proceedings in this matter were commenced by an application being made to the Ontario Railway and Municipal Board on behalf of the appellants for the approval of the Board of "a plan to deviate the track on the metropolitan division from Yonge street to a private right-of-way," which was described as being about 125 feet to the west, running parallel with Yonge street. On looking at the plan, it is obvious that this is a misdescription of the proposal, in that the proposed line lies only partially upon land proposed to be acquired by the railway company, and that it crosses in four or five places public highways which are not, and necessarily cannot be, described as portions of a private right-of-way. The object and effect of the proposed plan is plain. The company desired by it to take the line off Yonge street without obtaining the consent of the Municipality, and it was not concealed from their Lordships in the argument, that it would in future be contended that thereafter they would not be using the franchise or privilege obtained by the agreements of 1884 and 1886, or be affected by the fact that such franchise and privilege would terminate in June, 1915.

The respondents, the Corporation of Toronto, opposed the application, and contended that the company had no right to deviate from Yonge street, and that the Board had no jurisdiction to allow the deviation. The Board rejected that contention, and on the 25th day of October, 1911, they delivered a written opinion to the effect that the company had the right to deviate to their own right-of-way. It has been strongly contended before their Lordships, as it was in the Court below, that the respondents were bound forthwith to appeal against this expression of opinion of the Board, and that their not having done so should have been punished by a refusal of leave to appeal from the operative order subsequently made by the Board, or should at any

rate preclude them from disputing the correctness of the view of the Board as to the law of the case in any subsequent proceeding. Their Lordships are of opinion that there is no foundation for such a contention. The application to the Board was to approve a plan, and until it had made an operative order it was not incumbent (even if it was permissible) upon any objector to appeal against interim expressions of the view of the Board in matters of fact or law. It might well be that the operative order might not have been objectionable to the corporation, and until they learnt its terms they could not be required to decide whether they would dispute it or not.

On the 17th June, 1912, the Ontario Railway and Municipal Board made an order approving the plans filed by the appellants, and on the 16th December, 1912, leave was obtained to appeal against that order. On the 13th February, 1913, the Appellate Division of the Supreme Court of Ontario gave an unanimous judgment allowing the appeal and setting aside the order, and it is from this decision that the present appeal is brought.

Their Lordships are of opinion that the decision of the Appeal Court was right and should be affirmed. The line of the appellants in the portion of Yonge street which, ever since 1st January, 1888, has been within the city of Toronto, has been held and operated by the appellants or their predecessors, under and by virtue of the franchise and privileges obtained by them under the agreements of 25th June, 1884 and 20th January, 1886. It is true that these agreements were made with the county of York (within whose jurisdiction this portion of Yonge street then lay), and not with the city of Toronto, but by the indenture of 20th August, 1888, the county of York conveyed to the city of Toronto the whole of its interests in the portion of Yonge street within the city. It is not necessary to decide whether, under the circumstances, the Corporation of Toronto became formally the successors of the county of York under the agreement, so far as it related to this portion of the track, to such an extent that they could have enforced obedience to the terms of the agreement by proceedings in their own name, because, even if that were not so, the county of York were clearly trustees on behalf of the Corporation of Toronto of their rights under these agreements with regard to such portion of the track, and could not have released the appel-

lants from any of its conditions, otherwise than by the request, or with the consent of the Corporation of Toronto. The appellants are thus bound by the whole of the obligations of those agreements, so far as they relate to such portion of the track. As has already been said, there has been no statutable release from those obligations, and it is clear beyond the necessity of argument that if those obligations still exist the proposed new line is not in conformity with them. Their Lordships further are of opinion that the proposed line is neither a deviation nor a deflection within the meaning of the statutes quoted in the argument, relative to the powers of railway companies in general or the appellants in particular to deviate or deflect their track, but is a new line which the appellants are desirous of constructing and operating without having obtained any franchise or statutory authority so to do.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellants will pay the cost of the appeal.

EDITORIAL.

In this issue is published the argument of counsel in the appeal of Frederick M. Morson against the corporation of the city of Toronto. The argument of counsel for His Honor Judge Morson is very thorough and lengthy, taking up the question firstly under the heading of the Assessment Act, and secondly discussing the question under the authority of the British North America Act. The reply of the city is short and to the point, Mr. William Johnson, City Solicitor, having associated with him in its preparation his able assistant, Mr. B. W. Essery, and maintains the city's right to tax. Although judgment has been given in favour of the plaintiff by Judge McGibbon the question is of such great interest to a large number of people that the whole argument will be published in these pages. In the present issue will be found that portion of the plaintiff's argument dealing with the Assessment Act, and the city's defence. The text of the Judge's decision, together with the latter part of the plaintiff's argument dealing with the British North America Act will appear in the January issue.

The *Law Times* wishes all its readers, both present and prospective, a joyous Yuletide in every sense which that term conveys, and also that to them the year 1914 may be peaceful, prosperous, and happy. To those to whom 1913 may have brought sorrow, may their grief be forgotten in the joy of the new year, and to those to whom the year has brought good fortune may it ever continue, and with the coming festive season may the *Times* be pardoned if it hopes that resolutions for the new year, now old-fashioned, may mean something more to its readers than a subject of jest, and that each one may endeavor to do his quota towards making things a little better than they have been.

The year 1913 has been an eventful one. So rapid have been the strides by which the world has advanced that one connected with the forward march is apt to fail to appreciate its extent. The appalling marine disaster early in 1912, followed by the energetic and searching inquiry into its causes held in the United States, and the subsequent none

the less through quieter inquiry in England, has led to the safe-guarding of the lives of the public by the placing of wireless telegraphy on all sea-going ships of importance, together with the proper appliances for the saving of every passenger.

An event which stands out in bold relief is the recent utterance of the First Lord of the Admiralty, Mr. Winston Churchill, undertaking on the part of Britain to take a holiday from the construction of war vessels provided Germany would do likewise. This proposition has been accepted with acclaim by the United States, and without doubt when the pages of history are written the address containing this offer will be one of the most notable features not only of the year but of the decade, and probably of the century. Britain's First Lord of the Admiralty may be somewhat erratic and unconventional but he shews his origin by the largeness of his ideas and the fearlessness with which he propounds them, and it will mean much to the world at large if reason and the higher nature prevail and what is now merely a proposition becomes a reality. It may be the forerunner of the time when the sword shall be turned into the ploughshare, and arbitration take the place of warfare.

It is somewhat out of the province of a legal, literary magazine to discuss the financial situation, but owing to the fact that the new Bank Act has recently come into force it may be permissible to discuss the money stringency with reference to the conduct of the banks under that Act. When one considers that the produce of the country for the present year has never been greater and that from one end of Canada to the other the crops have been much above the average, and that over ninety million bushels of wheat have already been marketed in the West, the question arises what has become of the money. Have the returns from the grain thus far marketed been retained by the banks for advances already made to farmers, or what has become of it, for it is certain that the stringency has seldom, if ever, been so great as at the present time, and under existing conditions it seems impossible to obtain advances from the banks on anything but the most unusual terms.

It is stated that Great Britain, the world's greatest investor, is somewhat out of conceit with Canada at the present time. Whether this be so or not, and how largely Canada is herself responsible, is problematical. The theory has been advanced that the offerings of Canadian securities on the British market have been too numerous and have thus become cheapened, another, that a sentiment of irritation exists owing to the failure of Canada to arrive at some conclusion on the naval question. Be this as it may, the fact remains that British purse-strings are tightened and Canadian banks have very much "followed suit," with the result that the lack of employment throughout the country is, for Canada, phenomenal. It would be worth while for the readers of the *Law Times* to give the Bank Act critical consideration and compare the conditions under which Canadian banks do business with those existing in almost any other country in the world, with a view to obtaining some amendment thereto giving the public more consideration.

PERSONAL.

November 13th, 1913.

The Editor, Canadian Law Times,
Toronto, Ont.

Dear Sir: The attention of the Law Students Society of Regina has been called to an article which appeared in your issue for October, and I have been instructed to forward you a statement shewing their position as regards the Provincial Law School recently established in the city of Regina.

The article published in your personal column appeared it is true, in a morning paper published in this city but on the same evening the annual meeting of the student body was held and the matter fully discussed. The following resolutions were adopted unanimously:

"Resolved, that the benchers have the hearty support and co-operation of the law students of Regina in establishing the Provincial Law School in this city, and that the press be instructed that the article which appeared in the morning paper was not published with the sanction of the law student body and does not express its sentiments."

"Resolved, that we express to the benchers our appreciation of their efforts in securing the Provincial Law School for Regina, and that we assure them that they can rely on the hearty support and co-operation of the law students of this city in making it a permanent success."

The report of this meeting appeared in the press and since that date the one man responsible for the article out of a student body of sixty, has left the province.

We might state that the Law Society of Saskatchewan has purchased a building and that the school has been in full operation since the 1st day of October with an attendance of some sixty students. The lectures are of a high order and compare favourably with those which the students have received in the various universities of Canada. Each lecturer is a recognized specialist in his subject in this province. The dean Mr. T. D. Brown, B.A., is a man alive to western conditions. He received his education in Manitoba University, and for several years taught in the high schools in the West. Mr. Brown received his legal training under J. T. Brown, K.C., (now Mr. Justice Brown of the Supreme

Court Bench). He was called to the bar in 1905 and is now head of the firm of Brown, Thomson & McLean. As editor of various law reports and examiner of the Law Society for the past six years, Mr. Brown is fully conversant with, and has proven his ability to meet, the needs of the student.

The following lecturers are associated with him: J. A. Allen, LL.B.; J. F. Bryant, M.A. LL.B.; P. H. Gordon, M.A.; H. Y. McDonald, B.A.; T. S. McMorran, B.A.; G. H. Barr; P. S. Stewart; J. A. Cross; E. B. Jonah; P. M. Anderson, M.A.; S. P. Grosch, B.A.; J. N. Bayne, Deputy Minister of Municipal Affairs for Saskatchewan; C. J. Milligan, Master of Titles; A. D. Carrothers; R. W. Hugg; R. E. Turnbull; H. V. Bigelow, M.A. LL.B.; F. W. Turnbull; G. F. Blair; R. D. McMurchy, B.A.; J. C. Martin, B.A.

We trust that in fairness to the men responsible for the establishing of a law school in the province you will publish this statement in your esteemed magazine.

Yours truly,

JOHN A. STRANG,

Secretary Regina Law Students' Society.

A list of the qualified lawyers from outside points now entitled to practise law in the province of Saskatchewan was made public recently. Thirteen out of a total of twenty-three lawyers being successful. The names of the successful candidates are: C. P. Tisdall, J. W. Ward, F. B. Morrison, C. M. Johnston, J. W. Blythe, A. M. Whyte, N. Gentles, R. O. Hargreaves, F. H. Long, P. A. Gaudet, G. Allan, James Cowan, R. M. Cunningham.

"The Specials," the examinations upon which this class had to write, were held on November 4th at the same time as the other law examinations taking place throughout the province. The examinations at Regina centre were held at Regina College. There are 17 judicial centres throughout the province at which law examinations may be held, and at which qualified lawyers from outside points must sit for examination before being allowed to practise law in Saskatchewan. Five of the successful candidates tried their specials at Regina centre.

Included in the list of successful lawyers are the names of men from not only other sections of Canada but even from points in the United Kingdom, one at least having come to Saskatchewan from Scotland. Others hail from Ontario, Manitoba and the maritime provinces, all of whom have resided in Saskatchewan the prescribed length of time before writing on the examinations.

Voting took place recently among the 382 barristers on the roll of the Saskatchewan Law Society to elect benchers for the ensuing year in place of those retiring, and the following were declared to be elected: James Balfour, Regina; O. S. Black, Weyburn; W. B. Willoughby, Moose Jaw; James McKay, K.C., Prince Albert; Norman Mackenzie, K.C., Regina; J. A. M. Patrick, Yorkton; J. F. L. Embury, Regina; P. E. Mackenzie, Saskatoon; David Mundell, Mopsomin.

The following were the retiring benchers: James Balfour, Regina; O. S. Black, Weyburn; Herbert Acheson, Saskatoon; Norman Mackenzie, K.C., Regina; James McKay, K.C., Prince Albert; J. A. M. Patrick, Yorkton; W. B. Willoughby, Moose Jaw.

E. L. Elwood, Regina (now Supreme Court Judge and not eligible for re-election).

C. E. D. Wood, Regina (now a District Court Judge and not eligible for re-election.)

The November sittings of the Supreme Court met in Fredericton, the full bench being present with the exception of Hon. Justice Barry. Judge Landry took his seat for the first time on the bench since his recent illness.

Mr. J. Roy Campbell of St. John, having been appointed a King's Counsel, was called within the inner Bar. Mr. A. R. Slipp, K.C., on behalf of the counsel of the barristers' society, read the names of those who had recently passed the examination for attorney, and moved that the following be admitted and sworn, Registrar Allen administering the oath: Charles J. Jones, Jos. E. Michaud, J. Bacon Dickson, Isaac C. Spicer, John M. Keefe, A. Allison Dysart, William M. Ryan, Kenneth A. Wilson, Miles B. Innes and Urban J. Sweeney.

In the Supreme Court sitting in Charlottetown recently, before the full Bench of Judges, Mr. W. E. Bentley, K.C., presented a petition to their Lordships on behalf of James Augustus McDonald, praying for an order to be made by the Court with respect to his becoming a law student with Mr. Aeneas McDonald, barrister-at-law. The immediate prayer of the petition was for an order of the Court for the examination of the petitioner as to his competency as a student of law. Their Lordships granted the petition, directing the examination of the petitioner to be held.

Proceedings in the Single Court were held over for about half an hour while the following were called to the Bar:—

Thomas Crosthwaite, with honors; Nathan Phillips, Rudolph Phillips, Loftus Sutherland Cuddy, Thomas Moore Costello, John Hamilton Flett, John Montague Greer, William John McCallum, Frederick Harold White, Kenneth Wycott Wright, Russell Williams Treleaven, Robert Walter Rogerson Shearer, Philip Reginald Morris, Horace Faulconer Jell (Special.) Mr. McPherson, K.C., introduced them to Chief Justice Meredith, while the swearing in was performed by Mr. George M. Lee, Registrar of the High Court. Among the new legal aspirants was a lady solicitor, Miss Jean Cairns, who had been presented to His Lordship recently.

The Saskatchewan bar has been increased by the addition of nine qualified barristers, who successfully passed the examination held at Regina College, being one of the seventeen judicial centres at which law examinations may be held, and at which qualified lawyers from outside points of the province must sit for examination before being allowed to practise in the province according to the Saskatchewan statutes.

The successful candidates who passed the final examination, out of a large class of contestants are: In Regina, J. P. Pfeiffer, R. L. Hanbidge, D. A. McNiven, E. A. Gee and A. L. Geddes; from Saskatoon, P. J. Hodge and B. H. Squires; from Arcola, H. A. Ebbels; and Prince Albert, T. C. Davies.

The first intermediate candidates who were successful are: Regina, W. H. O. Green, E. C. Allin, L. C. Moyer, Edwin Sneath, E. B. Hutcherson, W. T. Moore, S. B. Lamont, W. M. Coxworth, E. L. Abbott, A. G. Styles; Battle-

ford, J. G. Olding; Moosomin, W. W. Lynd and E. W. Van Blaricom; Saskatoon, F. A. Sheppard, Herbert Olding and R. H. Milliken; Moose Jaw, W. R. Green, Lester McTaggart, Le Roy Johnson and J. W. Corman.

The second intermediate candidates successfully passing the examination are: Regina, W. J. Jolly, J. A. Strang, S. Curtin, G. C. Speers and A. L. Sample; Moose Jaw, H. E. Ross; Saskatoon, W. Lindal, S. H. Potter and W. B. Hartie.

The benchers of the Manitoba Law Society have arranged a series of lectures to law students, to take place during the coming season. The course includes lectures to senior students by R. M. Dennistoun, K.C., George Patterson, K.C., and W. H. Trueman, and to junior students by J. B. Coyne, C. A. Basten and A. T. Hawley.

A deputation from the laws committee of the University Women's Club, Vancouver, waited on the Attorney-General, Mr. Bowser, recently, to ask for certain changes in the recent amendment to the Public School Act, and in the Infants' Guardianship Act.

The deputation asked that the word "male" should be struck out of the recent amendment to the Public School Act, by which women are disqualified from sitting on rural school boards. The Attorney-General explained that the insertion of the word "male" was a mistake and that the disqualification of women for rural school boards was purely unintentional and would doubtless be corrected at the next session.

The second matter taken up was the Infants' Guardianship Act. The committee asked that the words "insane" or "out of the country" be inserted in clause B. This change would secure to the mother the guardianship of her children in either of the above cases—if the father was insane or out of the country. Within the past few years such a condition has arisen repeatedly, and on several occasions, where the father had left the country before the child was born, the mothers had been compelled to apply to the Courts for permission for their daughters' marriages, where the girls were under age. The Attorney-General gave the deputation the assurance that this would in all probability be changed in accordance with their wishes. The deputation

informed Mr. Bowser that already several mothers had been greatly benefited by the increased power given to the Courts in regard to the guardianship of the mother.

W. H. Bartram, one of the oldest active barristers in London, died suddenly from heart failure. He was 68 years of age and had practised in London since young manhood.

Hugh McDonald, barrister, was found dead in bed at his hotel in Golden, recently. He was formerly well known in Toronto.

Frederick W. Monro, an old and well known barrister of Toronto, died at his home, after a lengthy illness. Mr. Monro was born in Scotland and came to Toronto with his parents when a boy. His brother, the late Thomas Monro, was the engineer in charge of the Welland canal. Mr. Monro was educated in Toronto, and practised law in this city for over 35 years. For six years he lived in Chicago, being connected with the Chicago Title and Trusts Company. Five years ago he severed his connection with that company and returned to Toronto. Mrs. Monro survives.

Death claimed a well-known and greatly respected citizen recently, when Hon. Justice Jules Ernest Larue, ex-Judge of the Superior Court, passed away. Deceased, who had attained his seventieth year, had been ill only a few days, following an operation performed for peritonitis. The operation was successfully performed, but complications subsequently set in, which aggravated his malady, and despite the efforts of his attending physicians, carried him off.

The late Judge Larue was educated at the Quebec Seminary and graduated B.C.L. at Laval University, 1865, and was called to the Bar in 1866. He practised in Quebec with Messrs. Langlois and Angers, and subsequently with Messrs. Anger and Casgrain, and was created a Q. C. by the Marquis of Lorne in 1882. He edited the Quebec Law Reports during ten years and was appointed a Puisne Judge of the Superior Court of this province on April 12th, 1886, and became a Commissioner under 43 Vict. ch. 12, the same year, and in 1893 was appointed one of the Commissioners to revise the Code of Civil Procedure of the province of Quebec. His Lordship received the degree of D.C.L. from Laval University in 1890.

As a jurist he left his mark, having done great work in the codification of the Code of Civil Procedure, a matter in which his perfect knowledge of the intricacies of the old French law proved of almost invaluable service. The Code is considered one of the best in any country in the world to-day.

Mr. G. F. Shepley, K.C., has been elected by the Benchers to the position of Treasurer of the Law Society of Upper Canada, made vacant by the demise of Sir Æmilius Irving. Mr. Shepley is still in the Toronto General Hospital, where he was operated upon some weeks ago for appendicitis. In his absence the duties of Treasurer will be performed by Mr. Alexander Bruce, K.C., who was elected acting Treasurer.

A new law firm has been formed in Winnipeg under the name of Lawrence and Johnston, with offices at 907 to 909 Electric Railway chambers. The firm is made up of William D. Lawrence, formerly of Steinkopt and Lawrence, barristers, and Arthur E. Johnston, formerly of Johnston and Parker.

Sir Æmilius Irving, the oldest member of the Ontario Bar, died November 27th. He was born in 1823 at Leamington, England.

The late Sir Æmilius Irving was educated at Upper Canada College and called to the Bar in 1849, was created a Q.C. in 1864. He was a member of the House of Commons for Hamilton from 1874 to 1878. In 1893 he was elected treasurer of the Law Society of Upper Canada, and re-elected every year since.

The resignation of Judge T. G. Johnstone, of the Supreme Court of Saskatchewan, has been received by the Department of Justice. Judge Johnstone is resigning on account of ill-health.

Mr. James Strachan Cartwright, K.C., Master in Chambers at Osgoode Hall for the last ten years, died recently at his residence, 84 Woodlawn avenue. Mr. Cartwright was in his seventy-fourth year. He had been ill since July last, afflicted with heart and stomach trouble.

His death comes as a distinct loss to the legal profession and the judiciary of the province, who regarded his pains-

taking work and fidelity to legal traditions with something of a reverence. Not since the office of "Master" was established has it been filled by one who commanded such universal approbation. As arbiter, as mediator, as the one always willing to help litigants to an amicable settlement, Mr. Cartwright will be remembered in the Courts as almost without a peer.

W. J. Leahy, of Regina, and A. E. Doak, of Prince Albert, were appointed to the District Court Judgeships of Kindersley and Prince Albert, respectively. Those appointments complete the list of Judges to be appointed in Saskatchewan. Kindersley is a new district, while the Prince Albert vacancy was caused by the death of Judge Forbes.

Judge Leahy is a native of Halifax and went to Regina about six years ago, where he has been engaged in practice ever since. Judge Doak is an Eastern Townships man, but has practised his profession in Prince Albert about ten years.

Two Judges of the County Courts have been appointed Surrogate Court Judges by the Provincial Government. They are Judge Livingston, of Welland, and Judge Vance, senior Judge of the County of Simcoe.

The appointment of Judge Vance fills the vacancy made by the resignation of Judge Ardagh.

Mr. J. B. Archambault, K.C., City Attorney of Montreal, has been appointed a Judge of the Circuit Court.

For eighteen years Mr. Archambault has been in practice in the city, and for the past five years he has been senior member of the firm of Archambault, Robillard, Julien & Marin. His practice has been for the most part in commercial law. As one of the editors of the Judicial Reports he has been a close student of jurisprudence in the district of Montreal. Mr. Archambault was born at St. Antoine de Vercheres in 1871. He pursued his studies at St. Hyacinthe College and at Laval, from which he graduated in law in 1895.

SCHOOLS OF LAW AND LEGAL STUDIES.

If any evidence were required of the liberalising tendencies and influence of the Law Society it would be furnished by the statement of its activities in the sphere of legal education contained in the three contributions to our Symposium on the subject. Here we have the record of independent efforts, extending over a series of years, to supply the omissions of that other officialdom which obstructs the way to the carrying out of any of the larger schemes for the advancement of legal science. And here we have, too, through the agency of the Law Society, the beginnings of an organization for the provision of Schools of Law at all the great centres of learning if the ideal of a National or Imperial Legal University cannot be—or until it is—carried out. We say 'until it is' because notwithstanding Sir Albert Rollit's momentary pessimism, begotten of much disappointment in repeated attempts to secure unification of efforts, we believe that the ideas of Selborne, and Jessel, and Russell, and Finlay for a great Metropolitan School of Law, with its branches in the provinces, are still capable of fulfilment. Sir Albert Rollit thinks that the main lines of evolution have now been made fairly clear and that they are set 'in the direction of the association of all our London legal schools with the University;' but he under-estimates, if he does not altogether ignore, the powers for good—or for evil—of the Inns of Court, the remains of a once great Legal University, for the influence and resources of those ancient seats of learning are not lightly to be left out of account in the settlement of the problem. It is significant that the scheme of the Royal Commission for a remodelled University of London makes no provision for the creation of a Legal Faculty, and it may be shrewdly imagined that the framers of this scheme, with Lord Haldane at their head, still had in view the possibility of the creation of an independent university for legal studies. Mr. Budd is among those who believe that the foundation in the metropolis of a National and Imperial School of Law is an urgent necessity, and he says that 'the time is ripe, and more than ripe, for the establishment' of such a school. So far as the provinces are concerned, the paper of Mr. Munby shews that the way has been well prepared by the efforts of the Law Society working through the

provincial associations, and when the large unifying scheme comes—and there is no man more fitted for the task of formulating it than the present Lord Chancellor—the local Boards of Legal Studies are there ready to secure its extension to every important district.

—*The Law Journal.*

LEGAL EDUCATION.

I.—BY SIR ALBERT K. ROLLIT, LL.D., D.C.L., D.LITT.,

(Fellow and Senator of the University of London,
Ex-President of the Law Society.)

In The Law Journal.

I regret I can find but a few moments in which to comply with your complimentary request to me to write you an article for THE LAW JOURNAL about Legal Education in relation to the law school of the society, the University of London, the proposed legal university, and the school of law, advocated by the late Earl of Selborne, and ably supported by Sir Robert Finlay, K.C., then attorney-general, by the Law Society, and others. You are not wrong in assuming that this subject both has been and is one of the greatest interest to me; for, from my student days, I have thought and written upon it, and during my presidency of the Law Society, in 1903, my views took the practical shape of the report and course of legal studies framed by the special committee of the council of the society, of which I was chairman. These formed the foundation of the society's "school of law" which was then established and has since done so much useful and successful work.

It must be remembered, however, that our school was a tentative alternative of the proposed "legal university" (of 1855)—a title which its promoters gave it, but which is somewhat of a misnomer, or rather a contradiction in terms—since it connotes at once a universal, or general, and also a specialised, institution, dealing with only one branch of study—and also of the school of law contemplated by Lord Chancellor Selborne, Sir Robert Finlay, and others, but

which was ultimately rendered impossible by the attitude of one of the Inns of Court, whose opposition the council of the Law Society did its utmost to remove, both by deputations to the Inn and otherwise, but in vain. And, excellent as the substituted school of the Law Society has proved itself to be, as a more or less temporary alternative, there are still some who greatly regret the failure of the wider proposal, and hope it may be resuscitated.

Personally, I am not sure I am now of that number. The tentative—experimental, if you will—interval has been tided over so far even more satisfactorily than could have been hoped. Our law school has done admirable work; it has practically illustrated the abiding interest which the Law Society—long before any other legal organisation—has taken in legal teaching and examination, of both of which it was the pioneer, and it has secured for the society, as I urged at the time as one strong reason for its establishment, a status of great influence in dealing with the general problem of legal education, which is always with us, and upon which, in any future developments, the society will be entitled, by its work, to have its say. And much water has flowed under the bridge even since the not very remote days of Lord Selborne and his successors, and a reference to the evidence of myself and others given before the last Royal Commission on the University of London will shew that the outlook and potentialities of legal education are now much wider and brighter than they have been in the past.

Though many regard some very-much-repeated expressions of the Lord Chancellor, Chairman of the Royal Commission, about university and collegiate “atmospheres” as rather exaggerated and fantastic, not to say savouring of some of the academic cant which is too much in the air, still regard must be had to certain unquestionable advantages of the university aspect of legal studies, and of their being invested with a more general character than is possible at either the Law Society or the Inns of Court, jointly or solely, or even at any merely “Legal University,” such as was formerly proposed.

The problem of legal education in London and elsewhere has, therefore, in my opinion, passed from the narrower domain of a “legal university” to that of the relationship of all law schools to the universities, and especially, and for obvious reasons, to the Metropolitan University, London

being the centre and chief seat of English legal learning and practice.

At present, though isolated efforts have been made in that direction at King's and other colleges of the university, and in the committee of legal members of the university senate, a body of men exceptionally qualified to deal with such matters, it has not been found practicable to solve the problem; but the main lines of its evolution have been made fairly clear and point in the direction of closer connection of all our London legal schools with the university, of which they might well become constituent colleges or schools, and so provide scholastically not only for the qualifying and honours' examinations of the legal profession, but also for teaching—and for testing both teaching and scholarship by examination, so as to eliminate mere cramming—the higher branches of law for lawyers and also for many classes of the laity who ought to know at least a little law, such as magistrates and others.

The exact lines of co-ordination and co-operation between the university and its colleges and the schools of law is still on the anvil, but it seems most probable that the inadequate, and indeed misleading, idea or type of a "legal university" will be superseded by the higher and wider one of the connection of legal schools with the universities, while retaining in certain respects their independence and individuality and their professional character, as well as any rights they possess of admission to the practice of the law, and the control of the qualifying examinations therefor.

But, whatever may thus be done towards a more aggregated system of legal studies, with the indirect educational and social advantages of intercourse and inter-communication in the search and research for legal knowledge, there must be no surrender or restriction of the right of the individual student to work out his own salvation in his own way if he thinks proper, and every aid and facility should be given him (shall I add "or her"?) for this purpose by both the schools and the university.

The articulated clerk stands in an exceptional position. To most members of the solicitors' branch of the legal profession the system of articles (or apprenticeship) is sacrosanct, and perhaps properly so—though the masters' part is not always a very valuable contribution to legal education. But articles of clerkship, while they ensure practical knowledge

of legal and professional work, demand much time and leave comparatively less for the assimilation of legal principles and for academic or theoretical studies. Moreover, there are what I may call objective and subjective minds. The more objective mind requires, and relies on, external aids, such as teachers and teaching, lectures, and the like; the more subjective mind depends more on itself (a very valuable element in education and not one to be lost)—on books—the repositories of the thoughts, not of one age or mind, but the gifts and legacies of all ages and of multitudes of minds—and regards, save exceptionably, the lecture and the notebook, even if good (and some are both bad and deterrent), as spoon-feeding and relaxing, if not so much waste of time. Personally, after leaving a public school at fifteen, I never had the opportunity of teaching or teachers, but had to teach myself, often with difficulty and many failures, though even mistakes were not wholly without value in mental discipline, since they taught the life-lesson that difficulties are only things to be overcome. The task of the self-teaching legal student may thus be a hard one, but his armoury is a library, his battlefields victories and defeats; his legal maxim that of Hannibal: *Aut viam inveniam, aut faciam*.

Again, according to the expressed opinion of the Law Society, the continued, undiminished, and unrestricted opportunities for law students to obtain the external legal arts, and other degrees of the University of London is a matter of vital moment to the society itself and its work of legal education, to its students who prepare for the examinations for such degrees, and generally. This opinion has been formed and expressed formally and informally in reports, by resolutions, in evidence before the Royal Commission, and otherwise, on many occasions, and there can be no falling back from it, no consent to its abolition, restriction, directly or indirectly, and no alternative but fighting for it in Parliament, and, if necessary, in the constituencies, should anything of the sort be attempted, as is to some extent foreshadowed, and even done, in the report of the Royal Commission, which, at any rate on this point, raises a cardinal issue.

Articled clerks have, as a rule, to begin life early; equally as a rule, they are poor not only in means but in time; and they have not the opportunity, generally, of entering a residential, or collegiate, university. And the University of Lon-

don is the only one which has opened wide its doors to study and degrees, so wide that all who will work and satisfy high tests of their self-tuition and self-training can enter, in which respect it has incidentally taught the useful and very necessary habit of hard work, a means of self-discipline through effort to which too many nowadays refuse to subject themselves, preferring to look on while others work at games and sports, which, if the nation is to win even in those directions internationally, it will need to be reinforced by systematic gymnastics, as an essential element in all education, as I have seen at Columbia University, New York, and elsewhere, as at Harvard, where, too, the inductive method of teaching and learning law is also exemplary.

The open door of the University of London must not, then, be allowed to be closed, or left only half-open—the Commission report, which suggests some apparently innocent, but really dangerous, approaches in that direction, notwithstanding. The university is the university of the poor, especially in the middle class, no less than the man of means; it serves in this respect an enormous constituency; it has been made great use of by students in provincial cities and towns, especially those which do not possess the advantage of a few centres which have a university in their midst; and its degrees—its examinational degrees—have been sought by many of the most eminent lawyers of the day in both branches of the profession, and among the Judges, parliamentarians, and others at home, and also throughout the empire.

Therefore, I say, “Hands off,” and repeat my reply to a commissioner who asked me in giving evidence whether I did not regard it as unfair to give the same degree to internal and external graduates. It depends upon the degree and the graduate; but, incidentally, the question shewed how little at least one of the commissioners knew of the university, a fact which is a weakness of their report, bearing as it does throughout, marks of an alien commission trying previous royal commissions, not open to the same crucial criticism, and re-framing statutes, organisations, and administrative systems which have not yet had time and experience for a real trial, but which, so far as they have been tried, point to the need of amendments according to experience, not to solution in a brand new melting pot.

Finally, our course at the Law Society seems to me clear. Let us stand to our arms; let us protect our financial re-

sources for legal education, whether derived, as at present, in part by order of Court, from New and Clifford's Inns, or from our own funds, or other sources; let us continue, so long as is necessary, to develop and strengthen our own law school, so as to raise the status of our profession and to aid our articled clerks in properly and practically qualifying themselves, not only to pass our examinations but also by the study of law as both a science and a practical art, for the highest duties of the profession; and also for public life, in which they ought always to take their part, since the performance of public duty is the chivalry of to-day; meanwhile following courses of studies which will enable them to obtain the stamp of high degrees, whether by collegiate training or by examination, according to their times and circumstances; also to give us power and means for negotiation if and when the opportunity comes, as it surely will in the near future, be it in Parliament, or in the constituencies, or before the present, or new, Royal Commissioners, in the university, or any other bodies; and, when the occasion does arise, to help to place legal education on the high platform it should always occupy in a country which still offers the best practical example to the world of the administration of public and private justice, and of the reconciliation of law and liberty, as distinguished from license, of which it has been said, by way of reproach even upon our own jurisprudence, but untruly, that these, like law and equity, are two things which God has joined together and Man has put asunder. *Quis separabit?* As Burle said it, in words singularly applicable to our present times: liberty, to be enjoyed, must be limited by law; for, where law ends there tyranny begins; and the tyranny is the same, be it the tyranny of a monarch or of a multitude; nay, the tyranny of the multitude may be the greater, since it is a multiplied tyranny.'

LEGAL EDUCATION.

II.—BY MR. J. W. BUDD.

(Ex-President of the Law Society.)

In The Law Journal.

I have been asked to write a short article on "Legal Education, with special reference to the present position of the scheme for the creation of a great School of Law." The task is a doubly difficult one, for it is impossible in the compass of a "short" note to deal adequately with so important a subject; and, moreover, the terms "Legal Education" and "School of Law" are capable of widely different interpretations.

So far as legal education generally is concerned, the facilities for acquiring it have been largely extended since it was dealt with in the Report of the Select Committee of the House of Commons in 1846.

Taking first education in view of the practice at the Bar, the work in late years of the Council of Legal Education is too well known to your readers to require any comment from me. The work of the School of Law, established on a new and extended basis some ten years ago by the Law Society, has, no doubt, by this time also become widely known. The more immediate object of this branch of our work is to equip articled clerks with a knowledge of the principles of law in view of their future practice as solicitors. This school is working effectively under an able principal, aided by a staff of very competent tutors and readers, and is attended by a large body of students, the number for last year being 274: and for their use the Law Society provides in its building in Chancery Lane a complete set of students' rooms, which are largely made use of by the students, and are managed by a committee on which the Council of the Society, the teaching staff, and the students are represented.

In a large number of provincial centres schools for the teaching of law to articled clerks have been established by provincial law societies mainly in association with local universities and in co-operation with the Law Society, which makes large annual grants in aid of the expenses of these local schools of law.

It must be recognised, therefore, that in the last half-century great strides have been made in the providing facilities for obtaining instruction in law for intending barristers and solicitors; and, parenthetically, it should be added that the instruction given in all cases is not confined merely to the branches of law which are calculated to be useful in after life practice or to those which are the subject of examinations before the students are either called to the Bar or admitted as solicitors.

This teaching of the principles of law is in fact almost universally supplemented in the case of students for the Bar by reading in the chambers of a practising barrister, and in the case of solicitor students service under articles of clerkship is compulsory.

Apart, moreover, from the special teaching provided by the Inns of Court and the Law Society for intending barristers and solicitors, the universities, both the old and the new, count for much in the teaching of law. At Oxford and Cambridge great strides in this direction have been made, and the names of Dicey, Maitland, and others have become household words, and there are faculties of law in all the modern universities of which men of éminence as teachers are members, and the reconstituted University of London (as a teaching university) has also a Faculty of Law.

The facilities for the study of law have, therefore, increased greatly since the idea of a great school of law was first broached. The first suggestion was that of a "Legal University," with the Inns of Court as constituent colleges. Lord Selborne's (then Sir Roundell Palmer's) proposal which included students for both branches of the profession, was for a "National School of Law." Lord Russell of Killowen, in his memorable address in Lincoln's Inn Hall, called it a "great school of law." The charter proposed in 1904 by Sir Robert Finlay was for a school of law of which the Inns of Court and the Law Society were to be the constituent parts and the governing body.

The Law Society has consistently, since the proposal was first started, been a warm supporter of every proposal for the establishment in London of a great National School of Law open to both branches of the profession; and the scheme of 1904 only fell through because it was impossible to secure the adhesion of all the Inns of Court.

At the present time few would be found among those competent to express an opinion on the subject who would for a moment hesitate to say that the foundation in London of a National and Imperial School of Law is a necessity.

It is useless to found such an institution unless it will possess adequate means to attract and keep the best teachers of law in all its ramifications. If Sir Robert Finlay's scheme had been carried through it would have formed an important nucleus for such an institution and it would no doubt in due course of time have secured national financial support.

It is not generally known how much of the income of the Inns of Court could and would have been made available for the purpose. The whole of the income of the Law Society available for this purpose is now spent on its existing-system of legal education; and any institution formed under the joint auspices of the Inns of Court and the Law Society would require additional sources of income in order to become a national school worthy of the British Empire.

If such a school is to be a national institution its seat would necessarily be in London, but there is no reason why it should not have the co-operation and support of all our great universities, old and new.

The time is ripe, and more than ripe, for the establishment of a great national school. There are sufficient funds to commence with, and to make a beginning it only requires the co-operation of all the Inns of Court, and the adhesion of nearly all of them was, I believe, secured by Sir Robert Finlay in 1904 to the scheme then propounded. The facilities for legal education and the demand for it have largely increased in the last decade, and I trust that the time is not now far distant when practical shape will be given to the desire which is in the hearts of so many of us.

LEGAL EDUCATION.

III.—BY MR. FREDERICK J. MUNBY.

(Chairman of the Yorkshire Board of Legal Studies.)

In The Law Journal.

On the occasion of a meeting of the Legal Education Committee last spring, my old friend, the late Mr. Robert Ellett, remarked to me that "a good deal has been done since you read papers on Legal Education in the Provinces"; and we recalled the meeting of the Law Society in Dover, on the day when war was declared in South Africa, and he was vice-president of the Law Society. I reminded him how our good treasurer, the late Mr. Pennington, then said he "foresaw a vista of Provincial Law Societies coming for grants to the Council in Chancery Lane," and how some years later they had come, but on the invitation of the Law Society itself.

The changed attitude of the Law Society in the new century towards legal education and their expenditure of money in this direction have effected great things, and have brought lustre to their proceedings. They have also brought to their aid a "Society of Public Teachers of Law," which was deservedly inaugurated with great *éclat* in the Law Society's splendid Hall; and their influence for good is creating an attraction which is giving new life to our branch of the profession.

Alongside of this movement have grown up the provincial universities, and following the lead of Liverpool, and under the influence of the late Mr. Jevons, have sprung up Boards of Legal Studies, which have not only taken full advantage of all the new universities can give, but have given to the universities a character and stability by the creation of Law Departments, or Faculties of Law, which at least enable the universities to confer the honorary degrees of LL.D. and D.C.L., the value of which will of course increase with the reputation, which time will give, to the Law degrees of merit in the respective universities.

Here, then we find our schools of law. Yet some will rightly say, "But, after all, the education of an articled

clerk is, and will remain, a personal matter between him and his principal, who is bound by personal covenant to look after the clerk's education." That is true; but he is a bold man who can enter into that covenant regardless of the school of law within his reach. And the great merit of the situation now evolved, as above described, is that the solicitor, so bound by covenant, may not only fulfil that covenant indirectly through the Law School, but he also retains at least a share in the regulation and control of the clerk's education there.

Every country solicitor is, or may be, a member of his local Law Society, and every Law Society (at least in Yorkshire) sends, or may send a representative or representatives to sit on the Council of the Board of Legal Studies of the county or district. The grants made by the Law Society are made not to the universities direct but to the several Boards of Legal Studies, who subsidise the universities; and, by their representatives on the Law Committees of the Universities, these Boards maintain the interest and conserve the rights of the individual solicitor. Albeit, many solicitors are still a long way from realising all this; and no doubt the practical difficulty faces them of fitting the clerk's attendance at the university with his duties in the solicitor's office.

Among those solicitors who appreciate university training opinions vary as to the period in which the clerks should attend at the universities. Acting on the advice of the Public Teachers of Law, the Law Society, under the authority of a Judge's order, have set on foot this year a new plan by which, in the Law Society's own school, a year's attendance, followed by examination duly passed before articles, will secure the clerk's exemption from one year of his five years' service under articles. The intention is that in any other Law School approved by the Law Society, the same exemption shall in the same way be secured; and it goes without saying that the Law Society will approve, as a law school, the Law Faculty, or Law Department, of every university in England and Wales.

In Yorkshire this *régime* is so far acceptable that a great effort was made to have it in working order at the Universities of Leeds and Sheffield during the academical year now commencing. In this the Yorkshire Board have been dis-

appointed, the necessary Judge's order is not yet obtained, and the curriculum is not yet finally settled. In this the Law Society reasonably claim to have a voice, and it is obviously desirable that all such curricula should coincide with that of the Law Society in its own Law School; but the Law Society claim also a control in the examinations at the close of that curriculum. While this may be proper in relation to the examinations in any approved Law School (if such there be) independent of any university, it needs to be remembered that the examinations of a university must be consistent with its general management and its dignity. And therein comes further evidence of the value of the established Boards of Legal Studies.

The experience thus gained goes to prove the value of the Law Society to the new universities and the value of the universities to the Law Society; and it further proves the influence of the provincial solicitors in the counsels of the Law Society. Indeed, the outcome of these considerations appears to be that the greater the number of provincial solicitors who are members of the Law Society the more effective will be the education of their articled clerks, and the more money will be available for that education; and a further fact is worth remembering, namely, that if every solicitor out of every guinea he receives as a premium with his clerk would give a shilling to the treasurer of the Board of Legal Studies in his county or district, that Board would have a steady income for the prosecution of the important work in which so much progress has evidently been made.

It will be gratifying if this review of the present situation leads to an extension of learning among articled clerks and law students who are as yet outside the influence of a university, by the universities manifesting their readiness to carry their teaching outside their own borders, as the Board of Legal Studies may advise, and by the cultivation of the university spirit among students, which the Law Society is well able to encourage.

FIRST DIVISION COURT, COUNTY OF PEEL.

FREDERICK M. MORSON v. CORPORATION OF THE CITY OF TORONTO.

Written argument on behalf of the plaintiff, dealing with the provisions of the Ontario Assessment Act so far as they affect the case of the plaintiff.

R. A. Reid, D.C.L., counsel for the plaintiff.

1. The above named plaintiff, Frederick M. Morson, is the Junior Judge of the County Court of the county of York, and was so appointed by the Government of Canada by Order-in-Council at a fixed salary, and resides in the city of Toronto in the province of Ontario.

2. He receives from the Government of the Dominion of Canada a certain fixed salary payable monthly as remuneration for his services to the Government of Canada as such Judge, and has occupied this position for a number of years, and is engaged in no business, profession or calling of any nature or kind other than being in the employ of the Government of the Dominion of Canada, and the said plaintiff has no income of any nature or kind except the remuneration which he receives from the Government of the Dominion of Canada under his said appointment as County Court Judge.

3. The said plaintiff was assessed in the year 1911 by the said city of Toronto, assuming to act under and by virtue of the provisions of the Assessment Act of Ontario, levying and assessing upon him the sum of \$65.21, being an assessment for taxes on the remuneration derived by the said plaintiff as compensation for his services as Junior Judge of the County Court of the county of York, and which said remuneration is paid to him by the said Government of the Dominion of Canada as aforesaid.

4. The said plaintiff has paid the said taxes so assessed upon him as aforesaid in respect of his said remuneration under protest, and has brought an action for the recovery of the amount so paid by him against the said City of Toronto, and claims that he is not liable to be assessed on said remuneration in the manner and under the circumstances aforesaid on the ground that such remuneration is received by him by

virtue of his said position as County Court Judge engaged in the service of the Government of the Dominion of Canada, and, as such, is not assessable by the city of Toronto for municipal or any other purposes.

(a) If the opinion of the Court should be that the plaintiff is rightly assessed on said income, judgment is to be given for the defendant.

(b) If the opinion of the Court should be that he is not rightly assessed on said income for the reasons hereinafter stated, then judgment is to be for the plaintiff.

The defendant assumes to tax the remuneration of the plaintiff under and by virtue of the Ontario Assessment Act, R. S. O. 1897, ch. 224, as amended by ch. 23 of the Ontario Statutes for 1904, being the new Ontario Assessment Act, and which is still in force. It is the imposition of this income tax which the defendant objects to on the ground that he is the junior Judge of the County Court of the County of York, appointed as such by the Government of Canada, and exempt from income tax, and he further contends that the Act does not, and did not, intend to tax Judges' salaries, but that it is only the Municipality that assumes they have the right to do so under the Act. This part of the argument for the plaintiff deals only with the Assessment Act referred to, and on this branch of the case it is contended for the plaintiff that a "Judge" is not a "person" within the meaning of any part of that Act, relating to the taxation of income, that the remuneration or allowance which a Judge receives is not "income" within the meaning of section 2, sub-section 8 of the said Act, and that if it was intended to tax the remuneration of the "judiciary," or the "Judges of the Courts" as income, they should have been specially mentioned in the Act. Let us turn for a moment to section 2, sub-section 8 referred to, which is the section defining the meaning of "income" and see what is said. The section has not been altered or amended since 1904, and is as follows:

"INCOME."

8. "Income" shall mean the annual profit or gain "or gratuity (whether ascertained and capable of computation as being wages, salary or other fixed amount or unascertained as being fees or emoluments, or as being profits from a trade or commercial or financial or other business or calling) dir-

ectly or indirectly received by a person from any office or employment, or from any profession or calling, or by any trade, manufacture or business, as the case may be; and shall include the interest, dividends or profits directly or indirectly received from money or interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source whatever." (New).

While on this branch of the case it might be as well to cite here section 7 of the same Act which is of some importance in this connection, it says:—

EXEMPTION OF CERTAIN OFFICERS OF SUPERIOR COURTS
ABOLISHED AS TO FUTURE APPOINTMENTS.

7. "Exemption to which certain officers connected with the Superior Courts were, at the time of their appointment, and on the 5th day of March, 1880, entitled by Statute, in respect of the salaries, is abolished as respects all persons appointed by the Lieutenant-Governor to such offices after the said 5th day of March, 1880, and shall continue in respect of such officers only as were appointed before that date. R. S. O. 1897, ch. 224, sec. 12."

The officers referred to in the said sec. 7 of the Ontario Assessment Act, 1904, will be found named in the Revised Statutes of Ontario, 1877, vol. I., at page 411, being ch. 40, sec. 15; an Act referring to the administration of justice and the Court of Chancery in Ontario. The officers referred to are the Master in Ordinary, the Registrar, the Referee, Clerk of Master's Office and the Clerk of the Registrar. Sub-section 2 of the said section 15 sets forth that the salaries of these officers, and of all officers of the said Court, shall be paid free from all taxes and deductions. This Act of 1877 makes a distinction between "officers" and "Judges," the two classes being entirely distinct and separate as a reference to the said Act will shew.

The Judges did not come within this latter clause, nor were they any of the officers referred to in the Statutory Exemption therein mentioned. Let us assume for the sake of argument that the Assessment Act so far as it assumes to tax Dominion officials is *intra vires* which the plaintiff does not admit but denies. It will be noticed that by sec. 7 the exemption referred to therein is abolished "as respects all persons appointed by the Lieutenant-Governor to such offices after March, 1880." Here again we have an excellent guide

to the intention of the Ontario Legislature when passing the Assessment Act, 1904. The reference is to persons appointed by the Lieutenant-Governor of Ontario. That means appointments made by the Provincial Government of Ontario. The reference to the year 1880 comes 2 years after 1878, when the case of *Leprohon v. City of Ottawa* was decided. There is no reference to the Federal or Dominion appointments, nor any interference with their salaries or exemption, because *Leprohon v. City of Ottawa* had settled that matter 2 years before. The Provincial Legislature of Ontario had no jurisdiction in this respect, and so when passing the Ontario Assessment Act of 1904 they continued sec. 7 as it had appeared in the previous Assessment Acts of Ontario. It might also be mentioned that the provisions of the present section 7 appear in the Ontario Statutes of 1880, 43 Vict. ch. 27, sec. 5, for the first time. This clearly shews what the Legislature had in mind when passing the present Assessment Act, and that it recognized the limits of its jurisdiction. Now at the time sec. 7 was inserted in the Assessment Act, R. S. O. 1897, ch. 224 and sec. 2, sub-sec. 8 in the new Act of 1904, the case of *Leprohon v. City of Ottawa*, 2 Ont. App. Rep. 522 (1878), had been decided and was law. It was decided by the Ontario Court of Appeal in March, 1878. That case, together with 12 or 15 other cases subsequently decided by the Superior Courts in the different provinces of Canada on this very same question (to be cited on another branch of the case for the plaintiff) decided that under the British North America Act, 1867, the salaries of officials of the Dominion Government could not be taxed by the province, nor were they seizable or attachable by Court process, nor could they be compelled to pay a judgment debt by instalments, and further, that the province had no authority to confer such power on the municipalities, and these decisions are well known all over Canada, and by every legislature and judicial tribunal.

The law is clear that it is presumed that the Legislature has informed itself as to the state of the law on any subject as to which it undertakes to legislate, and makes new laws or amends old laws accordingly. This rule is very well stated by Lord Blackburn in the case of *Young v. Major, &c.*, of *Leamington* (1883), 8 App. Cases 517, 526, where he says: "The Courts ought in general in construing an Act of Parliament, to assume that the Legislature knows the existing

state of the Law." And in the case of *Mulcahy v. R. L. R.*, 3 H. L. 306, at p. 319, the Judges said that the Treason Act, 1796," did in terms sanction and embody the received interpretation of the Statute of Treasons, with which it must be presumed that the Legislature was acquainted, and which it left undisturbed."

And in *MacMillan v. Dent* (1907), 1 Ch. 114, Lord Justice Moulton said: "In interpreting an Act of Parliament you are entitled, and in many cases bound, to look to the state of the law at the date of the passing of the Act in order to properly interpret the Statute in question."

In the case of *The Dean, &c., of Ely v. Bliss* (1842), 5 Beav. 574, at p. 582; 11 L. J. Ch. 351 at p. 354, Lord Langdale M.R., says: "Every Act of Parliament must be considered with reference to the state of the law subsisting when it came into operation, and when it is to be applied; it cannot otherwise be rationally construed. Every Act is made, either for the purpose of making a change in the law, or for the purpose of better declaring the law, and its operation is not to be impeded by the mere fact that it is inconsistent with some previous enactment."

In the case of *Yorkshire Insurance Co. v. Clayton*, 8 Q. B. D. 421, at p. 426; 51 L. J. Q. B. 82, at p. 85, Brett, L.J., says: "It is a well known rule or canon of construction that in construing an Act of Parliament one ought to take into account the state of the law and of judicial decisions at the time the Act is passed."

Now the case of *Leprohon v. City of Ottawa*, was decided in 1878, and from that date up to the completion of the Revised Statutes of Ontario, 1897, when all the laws of Ontario were revised and consolidated, no mention is made of taxing the remuneration of Dominion Government officials, and between 1897 and 1904, when ch. 23 of the Statutes of Ontario, 1904, was passed, the law was in a similar state. So that up to 1904 the Ontario Legislature impliedly upheld the decision of *Leprohon v. City of Ottawa*; or for a period of 26 years, and the said Statute has not been amended or altered since 1904, so far as this part of the Act is concerned.

Therefore, with full knowledge of the then present state of the law (and the Legislature is presumed to legislate at all times with full knowledge of the then state of the law), at the time they passed the Assessment Act of Ontario in R. S. O., 1897, and again in 1904, when the new Assessment Act

was passed, the Ontario Legislature did not see fit to abolish this exemption, or to declare the decision in *Leprohon v. City of Ottawa*, no longer binding, which they could have done, in either sec. 2, sub-sec. 8 or in sec. 7 referred to, or by any other part of said Act, nor by any amendment since 1904, but on the contrary expressly stated that certain exemptions therein named were to be abolished which does not mention or include the exemption of remuneration of the Judges of Ontario. If the Legislature had intended to abolish this exemption or to render null and void the decision in *Leprohon v. City of Ottawa*, they would have said so specifically or would have provided expressly for taxing the remuneration of Judges. The Legislature must have intended the Assessment Act to receive the same construction as though the decision in *Leprohon v. City of Ottawa* had been expressly incorporated into it. That decision was a decision on the British North America Act, 1867, which is an Imperial Statute passed by the Imperial Parliament at Westminster, and has never been expressly overruled. The principle of that decision it is submitted, has been embodied in the Ontario Assessment Act of 1904, herein referred to, which can only be amended and remedied by the Legislature of Ontario, and that Legislature has no jurisdiction to tax the salaries of Canadian Government appointees.

Now as to the word "person" when used in an Act of Parliament:—

The Interpretation Act of Ontario, sec. 8, sub-sec. 13, says, that "the word 'person' shall include any body, corporate or politic, or party . . . to whom the context can apply according to law."

And in the case of *Pharmaceutical Society v. London and Provincial Supply Association*, 49 L. J. Q. B. 736, 5 Appeal Cases 857—Lord Blackburn said as regards the word "person": "The meaning which it has in any particular Act, must depend on the context and the subject-matter. Circumstances, and indeed very slight circumstances, in the context might shew which way the word is to be construed in an Act of Parliament."

Then in what sense does the context of sec. 2, sub-sec. 8 shew the word "person" to be used? Clearly it means a person engaged in business of a commercial, manufacturing or financial nature, or in the practice of a profession or calling, or in the carrying on of a trade, or as a clerk or other

such employment in the nature of the relation of master and servant.

The expressions used in sec. 2, sub-sec. 8 of and throughout the Assessment Act are restricted, and it is clearly intended to exclude these things which are not enumerated. Certain things are precisely stated to be "income," and to be liable to taxation. It is intended therefore, to exclude everything else and all things different in genus and description from those which are enumerated. "*Expressio unius est exclusio alterius*." The express mention of the one thing implies the exclusion of another. This is one of the first principles applicable to statutory construction, and it is particularly applicable to the case under consideration.

The Judiciary is a separate and distinct body of men all over Canada, appointed by the Dominion Government to administer the laws of the country; they are not employees in the sense in which the word "employment" is used in the Assessment Act of Ontario, nor are they office-holders. In an American case it has been laid down that the words "office" and "officer" are terms of vague and variable import, the meaning of which necessarily varies with the connection in which they are used; and to determine it correctly, in a particular instance, resort must be had to the intention of the statute, and the subject-matter in reference to which the terms are used. See *State v. Kuehli*, 53 Minn. 147, 155; 54 N. W. 1069. It is further submitted it cannot refer to the Judiciary, because the provincial Legislature has no jurisdiction in the matter. They hold what are known as "judicial appointments" as Judges. The word "employment" is used in the Act in the same sense as the word "office" in the Act, that is *ejusdem generis*, and means being employed in a position of a commercial, trading, manufacturing, financial or other such business nature as described throughout the Act, and in the sense of the relation of master and servant, such as a managerial position or a clerkship, or as a secretary, treasurer, director, and other similar positions. The Judges of the Courts are what has been termed "judicial functionaries" occupying a privileged and special position, and enjoying immunities of various kinds in the community as witness the great care taken to secure the independence of the Judges, and if it is proposed to tax them they must be specifically mentioned in any statute as a class. They are not Provincial "appointees," but Dominion "appointees," and their salary

is paid by the population of the whole of the Dominion of Canada, and not from funds collected in any one province, then why should their remuneration be taxed by any one province or municipality?

In the case of taxing Acts the intent to burden the subject must be specially, expressly and distinctly set forth. It is submitted that the Judiciary must be specially mentioned in any taxing Act as a class, just as financial, trading, manufacturing, commercial, professional and such other callings are named. It would have been an easy matter to name the "Judiciary" or the "Judges of all the Courts," or "the Federal and Dominion Officers and the Judges of all the Courts," in the same manner as commercial, industrial, financial, professional, trading and other occupations are named with precision all through the Assessment Act, if it had been the intention to tax them, but the Legislature has not thought fit to do this. On the contrary, it distinctly recognizes the authority of *Leprohon v. City of Ottawa*, as established by the judicial decision of the Ontario Court of Appeal, which is just as strong as any statute or specific exemption under the Assessment Act of Ontario, and for that reason the Legislature did not consider it necessary to expressly sanction the exemption in the latest Ontario Assessment Act of 1904, and they did not abolish the exemption in any part of the Ontario Assessment Act, Statutes of 1904, well knowing at the same time that the exemption had been already established in Ontario by the decision of the Court of Appeal in *Leprohon v. City of Ottawa*, referred to, and this case has been recognized as good law in Ontario in the case of *Bucke v. City of London*, reported in vol. 6 of the Ontario Weekly Reporter (1905), p. 406, 10 O. L. R. 628. This latter case was argued in the Divisional Court before Chancellor Boyd, Justice Meredith and Judge Magee, who rendered an unanimous decision, and recognized *Leprohon v. City of Ottawa*, which was decided on the construction of the British North America Act, 1867, as still good law in Ontario, although the case of *Bucke v. London* was decided on another statute. *Leprohon v. City of Ottawa*, which has not been expressly overruled, has been followed all over Canada for upwards of 30 years, and at least 15 other cases (being all the decisions in the Reports on this question) from all parts of Canada have been decided in the same way on the authority of that case. In a case in the Supreme Court of Canada known as *Abbott*

v. *City of St. John*, heard in 1908, some doubt was expressed concerning the soundness of the decision in *Leprohon v. City of Ottawa*, but it was not overruled, and Mr. Justice Girouard, who gave a dissenting judgment said, that he was not prepared to decide that all these Superior Court Judges who decided the 12 or 15 cases referred to for the last 30 years were all wrong. They were the most eminent Judges in the land, he said, and he would await the decision of the Privy Council before saying they were not right. The case however did not go to the Privy Council. And he further pointed out that the Privy Council has decided in a Canadian case that they will not grant leave to appeal from a decision whether right or wrong, where it is in accordance with the law which has been observed and acted upon in a colony for many years. As Lord Macnaghten said, "This seems to have been 'the law for 18 years,' and leave to appeal was refused on this ground alone, *Armstrong v. The King*—Canadian Case. The question will be dealt with more fully in the arguments on the constitutional aspect of the present case.

Now it is submitted, that all the words used in sec. 2, subsec. 8 of the Assessment Act, must be interpreted according to the *ejusdem generis* rule. This rule is well stated by Lord Campbell in *R. v. Edmundson*, 28 L. J. M. C. 213, 215, where he says:—

"I accede to the principle laid down in all the cases which have been cited, that, where there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified."

In another case, *Scales v. Pickering*, 4 Bing. 448, Best, C.J., says: "Construing the word 'footway' from the company in which it is found, the Legislature appears to have meant those paved footways, &c., and in *Shaw v. Ruddin*, 9 Irish C. L. R. 214, it was said by the Judges in construing the word "cart" in an Act: "We have to aid us in the interpretation of this Act, the long established rule of construction namely; that we must look to the associate terms in connection with which we find the word 'carts'; we find then, that in the several sections in which the word occurs, it is associated with carriages and vehicles none other than those let or hired."

In the case of *Colquhoun v. Heddon* (1890), 25 Q. B. D. 129, at p. 135; 59 L. J. Q. B. 465, at p. 467, Lord Esher, M.R., said: "The proper construction to be put on general

words used in an English Act of Parliament is, that Parliament was dealing only with such persons and things as are within the general words and also within its proper jurisdiction, and that we ought to assume that Parliament (unless it expressly declares otherwise) when it uses general words, is only dealing with persons or things over which it has properly jurisdiction."

In the case of *Smelting Company of Australia v. Commissioners of Inland Revenue* (1897), 1 Q. B. 175, at p. 181; 66 L. J. Q. B. 137, at p. 140, Lopes, L.J., says: "I think the proper way of construing those words is to apply to them what is known as the *ejusdem generis* doctrine, or, as it is sometimes expressed, the doctrine '*noscitur a sociis*' which is that where general words immediately follow or are closely associated with specific words, their meaning must be limited by reference to the preceding words."

In the case of *Ystradyfodwig and Pontypridd Main Sewage Board v. Bensted* (1907), A. C. 264, at p. 268; 76 L. J. K. B. 876, at p. 878, Earl of Halsbury, says: "A very familiar canon of construction that, where you have a word which may have a general meaning wider than that which was intended by the Legislature, when you find it associated with other words which shew the category within which it is to come, it is cut down and overridden according to the general proposition which is familiarly described as the *ejusdem generis* principle."

In the case of *In re Stockport, &c., Schools* (1898), 2 Ch. 687, the Court of Appeal read the words "or other schools" in sec. 62 of the Charitable Trusts Act, 1853, as applying not to all schools of whatever description, but only to schools similar in character to the "Cathedral Collegiate (or) Chapter Schools," mentioned in the section, Lindley, M.R., said (p. 696): "I cannot conceive why the Legislature should have taken the trouble to specify in this section such special schools as cathedral, collegiate, and chapter, except to shew the type of school which they were referring to, and in my opinion other schools must be taken to mean other schools of that type."

Applying then this rule to sec. 2, sub-sec. 8, the intention is clear to tax on income only commercial, industrial, manufacturing, financial and professional occupations and callings and other "persons carrying on business." Judges, for instance, do not "carry on business," neither are they carrying

on a commercial, manufacturing, trading, or "other business or calling" neither are they "practicing a profession." The words "other business or calling" in sec. 2, sub-sec. 8, are used *ejusdem generis* and must mean "other business or calling" in the nature of trading, commercial, manufacturing, professional or financial business or calling. It is submitted that it is only those persons who receive an annual profit, gain, gratuity, wages or salary as the result of "carrying on such business or calling" that are intended to be taxed on their incomes under the Ontario Assessment Act. The other words in the said sub-section with which these words are associated and found clearly shew this to be the right interpretation.

The words "or other business or calling" in sub-sec. 8 of sec. 2, in their grammatical construction relate and refer to the whole sub-section, and the words "as the case may be," and also the words "and also profit or gain from any other source whatever," are all grammatically related and refer to the same thing, namely: the profit, gain, salary, fees, etc., received by a person carrying on any of the kinds of business or practicing the professions mentioned in the various parts of the section, and throughout the Act. In accordance with the rule of statutory construction which says that we are entitled to look at the whole Act in order to ascertain what is meant, we find then that the whole Act deals primarily and solely with commercial, manufacturing, financial, industrial, professional, trading and other such undertakings, and businesses of every known kind.

In this particular sub-section, and all through the Act, we find the references are to "business," "calling," "persons carrying on business," "practising a profession" "carrying on business" "business assessment," and the enumeration of scores of different kinds of businesses and professions throughout the Act, but no mention of the "Judiciary" or of the Federal and Dominion officials, and the specific enumeration of the professions is also included, all tending to shew that the "Judiciary" or "Judges" or the Federal and Dominion officials were clearly not intended to be included, or taxed on their remuneration.

If the remuneration of the Judges was intended to be included in sec. 2, sub-sec. 8, or in any part of the Act, the "Judges" or "Judiciary," or the "Judges of all the Courts in the Province," or other appropriate words would have been used to mention them specifically in that part of sec. 2, sub-sec.

8, before the specific enumerations therein mentioned, or in some other place in the Act, and since they are not so named or specifically mentioned the further well known principle of interpretation of statutes which prevents persons or things of higher rank than those named being included unless the words clearly and unambiguously support such interpretation, applies, as well as the well-known maxim "*expressio unius est exclusio alterius*."

The following authorities are cited on this point:

It is a settled rule of law in the interpretation of statutes, that, when words describing the rank, position or kind of persons, or things, are used in a descending order according to the rank, position or kind, the general words superadded to them do not include persons or things of a higher rank, position, kind or importance than the highest names, and that in such case the general words following the particular words will not include anything of a class superior to that, to which the particular words belong.

As illustrating this proposition of law and its application to sec. 2, sub-sec. 8 of the Ontario Assessment Act, which is the clause defining the word "income," and naming certain businesses, callings, etc. See the cases of *Archbishop of Canterbury's Case*, 2 Rep. 46b; *Copeland v. Powell*, 1 Bing. 373; *Cope v. Barber*, L. R. 7 C. P. 393, where it was decided sec. 3, 13 Eliz. ch. 10, which avoided conveyances by masters and fellows of colleges, deans and chapters of cathedrals, parsons, vicars and "others having any spiritual or ecclesiastical living," does not include bishops. And in the cases in 2 Inst. 151, 457, 478, 2 Rep. 46b, it was decided that ch. 28, Statutes of Marlbridge, 52 Hen. III., which gave a right of action in certain cases to "abbots, priors and other prelates of the Church," did not, according to Lord Coke, include bishops; because among other reasons, the bishop is of a higher degree than an abbot.

And again in the case of *Casher v. Holmes*, 2 B. and Ad. 592, per Parke, J. It was held that, duties imposed, under the general head of "metals" upon "copper, brass, pewter, and tin, and on all other metals not enumerated," would not include the higher metals of gold or silver, which are commonly known as precious metals, as those latter metals are of a superior kind to the other particular metals mentioned.

And in the case of *Aelesbury v. Pattison*, 1 Doug. 28, with which see *Evans v. Stevens*, 4 T. R. 224, 459, it was decided that the 22 and 23 Car. II., ch. 25, which empowered the Lords of "manors and other royalties" to grant a deputation to a gamekeeper, was limited to the lords of such royalties as are inferior to manors; for if a royalty of a higher nature had been meant, it would have preceded the term "manor."

The Judiciary or Judges of the Ontario Courts being of a higher class than any of the enumerated "persons" in sec. 2, sub-sec. 8, on the principles laid down in these cases do not come within the terms of the said sub-section, nor within the provisions of any part of the Ontario Assessment Act for income tax purposes.

The Judges of the Courts of Ontario not being "persons" within the meaning of sec. 2, sub-sec. 8 of the Ontario Assessment Act, 1904, and the amendments thereto, for the reasons given herein, it is submitted that those cases apply to the plaintiff's case which decide that those cases apply to the language is absolutely indispensable in Statutes, such as the Ontario Assessment Act, imposing a tax or charge on the subject in order to bind the plaintiff.

It is a well settled rule of law that those statutes known as taxing acts which impose pecuniary burdens and charges upon the subject must be imposed by clear and unambiguous language, because in some degree they operate as penalties and such statutes receive a strict construction. In such cases the subject is not to be taxed unless the language of the statute clearly imposes the obligation on him. See cases of per Bayley, J., *Denn v. Diamond*, 4 B. & C. 243; per Parke, J., *Doe v. Snaith*, 8 Bing. 152; per Parke, J., *Harris v. Birch*, 9 M. & W. 594; *Sneezum v. Marshall*, 7 M. & W. 419; per Field, J., in *R. v. Barclay*, 8 Q. B. D. 306; *Partington v. Atty.-Gen.*, L. R. 4 H. L. 100, applied by Hamilton, J., in *Northumberland (Duke) v. Inl. Rev.*, 80 L. J. K. B. 875; *Oriental Bank v. Wright*, 5 App. Cas. 842; *Inl. Rev. v. Angus*, 23 Q. B. D. 579; per Hamilton, J., in *Lariston Monotype Corpn. v. Anderson*, 80 L. J. K. B. 951; per Cur., *Hull Dock Co. v. Broune*, 36 R. R. 459; per Pollock, C.B., *Nicholson v. Fields*, 31 L. J. Ex. 233; *Parry v. Croydon Gas Co.*, 11 C. B. N. S. 579, 15 Id. 568.

In a case of reasonable doubt the law is clear that a statute which imposes a burden on the subject such as a

taxing Act must be given a construction most beneficial to the subject and against the legislature which has failed to explain itself.

See the cases of: *Hull Dock Co. v. Browne*, *supra*; per Pollock, C.B., *Nicholson v. Field*, *supra*; per Bramwell, B., *Foley v. Fletcher*, 28 L. J. Ex. 106.

See *Lewis v. Carr*, 1 Ex. D. 484; *Secretary of State for India v. Scoble* (1903), A. C. 299; per Lord Lyndhurst, *Stocton Railway Co. v. Barrett*, 11 C. L. & F. 602; per Parke, J., *Re Micklethwaite*, 11 Ex. 456; per Lindley, L.J., *Re Thorley* (1891), 2 Ch. 613; *Price v. Monmouthshire Canal Co.*, 4 App. Cas. 197.

If a statute proposes to impose a charge "the rule," said the Judicial Committee in the case of the *Oriental Bank v. Wright*, 5 App. Cas. 842, 856, is "that the intention to impose a charge upon a subject must be shewn by clear and unambiguous language."

And to the same effect is the case of *Simms v. Registrar of Probate* (1900), A. C. 323, 337.

In the case of *In re Micklethwaite*, 11 Exch. 452, 456, Parke, B., says:

"It is a well established rule that the subject is not to be taxed without clear words for that purpose."

Lord Cairns in the case of *Partington v. Attorney-General*, L. R. 4 H. of L. 100, 122 says: ". . . if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however, apparently within the spirit of the law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute, where you can simply adhere to the words of the statute."

The language of Lord Cairns was adopted by Collins, M.R., in the case of *Attorney-General v. Earl of Selbourne* (1902), 1 K. B. 388, 396, being a succession duty case. He said: "Therefore the Crown fails if the case is not brought within the words of the statute; and if there is a case which is not covered by the statute so interpreted, that can only be cured by legislation, and not by any attempt to construe it benevolently in favour of the Crown."

In *Cox v. Rabbitts*, 3 App. Cas. 473, 478, Lord Cairns said: "A Taxing Act must be construed strictly, you must

find words to impose the tax, and if words are not found which impose the tax, it is not to be imposed."

Lord Alverstone, C.J., in the case of *Whiteley Limited v. Burns* (1908), 2 K. B. 705, 709, says: "The Act upon which the construction of this case turns is a Taxing Act, and being so must, in my opinion, be construed strictly, and the onus lies on the Crown to shew that the persons whom it is sought to tax fall clearly within its operation."

In the case of *Tennant v. Smith* (1892), A. C. 150 at p. 154, Lord Halsbury, L.C., said: "This is an Income Tax Act, and what is intended to be taxed is income. And when I say 'what is intended to be taxed,' I mean, what is the intention of the Act as expressed in its provisions, because in a Taxing Act it is impossible, I believe, to assume any intention—any governing purpose in the Act—to do more than take such tax as the statute imposes. In various cases the principle of construction of a Taxing Act has been referred to in various forms, but I believe that they may all be reduced to this—that inasmuch as you have no right to assume that there is any governing object which a Taxing Act is intended to attain other than that which it has expressed by making such and such objects the intended subject for taxation, you must see whether a tax is expressly imposed. Cases, therefore, under the Taxing Acts always resolve themselves into a question whether or not the words of the Act have reached the alleged subject of taxation."

In the case of *Desjardins v. The Corporation of the City of Quebec* (December 15, 1900), vol. 18 Que. Off. Rep. Sup. Ct. 434, plaintiff was a member of the Civil Service and sued to recover the sum of \$26, paid by him as taxes, and it was decided by Caron, J., that the members of the Civil Service constitute a special class, that special provisions concerning them are made by Canadian law, and as the statute in question (40 Vict. ch. 52, sec. 3) imposing a personal tax as therein stated, did not specially include the members of the Civil Service, they were exempt from its operation. *Leprohon v. City of Ottawa*, with other cases, was cited in support of the argument of plaintiff, and the Court gave judgment for the plaintiff for \$26, paid to the city of Quebec under this Act.

In conclusion the plaintiff says that a Judge has been described as a direct representative of the Government; the

Crown and the people, charged with the high and responsible duty of seeing that the law is faithfully administered. He is clothed with what is called "Judicial Authority," in other words he is what has been termed an "instrumentality of Government" to administer and enforce the laws of the land, and it is submitted on behalf of the plaintiff that being one of the instrumentalities and agencies of the Crown, the Canadian Government, and the people of Canada for the purposes referred to, the "Judges" should be specifically mentioned in the Ontario Assessment Act if it is intended they should pay income tax. The said Act does not anywhere expressly authorize such tax, nor state that such Canadian Government officials in Ontario shall be taxable on their remuneration, and the executive or Cabinet at Ottawa being the head of the Canadian Government, and the plaintiff having been appointed by such Government, it is submitted he comes within the principle that the Crown is not bound by a Statute unless expressly mentioned, and therefore the plaintiff is not bound by the provisions of the Ontario Assessment Act.

For the reasons herein set forth it is submitted that the remuneration of the Judges of the Ontario Courts is not subject to Income Tax under the provisions of the Ontario Assessment Act, 1904, and amendments thereto, and judgment should be entered for the plaintiff accordingly.

ROBERT A. REID,

Toronto, October 1st, 1913.

Counsel for the Plaintiff.

Written argument on behalf of the defendant, The Corporation of the City of Toronto.

William Johnston and Basil W. Essery, solicitors for defendant.

1. The above-named plaintiff, Frederick M. Morson, is the Junior Judge of the County Court of the County of York, and was appointed by the Government of Canada by Order in Council at a fixed salary, subject to the receipt of such additional fees provided for under the Surrogate Courts Act and amending Acts, and resides in the city of Toronto in the county of York, and province of Ontario.

2. The said plaintiff was, in the year 1911, given notice of assessment for the year 1912, under Roll No. 66130, as a Division Court Judge at his chambers in the Court House, in the said City of Toronto, on a total taxable income of \$3,400 under and by virtue of the provisions of the Assessment Act of Ontario and its amending Acts.

3. The notice referred to in paragraph 2, conspicuously provided for and notified the said plaintiff that "if you deem yourself overcharged, or otherwise improperly assessed, you, or your agent, may notify the Assessment Commissioner in writing of such overcharge or improper assessment within 10 days after the 25th day of September, 1911, and your complaint shall be tried by the Court of Revision for the municipality of the city of Toronto;" and, by further special notice that "Appeals must be lodged in the office of the Assessment Commissioner not later than the 5th day of October, 1911."

4. Subsequently, under the authority of the hereinbefore recited Act, in the year 1912, a tax bill was delivered to the said plaintiff for an amount calculated upon the income of the said plaintiff as set out in the notice previously issued.

5. The said plaintiff, during the year 1912, paid, under protest, the income tax assessed as above set forth amounting to sixty-five dollars (\$65.00), and entered suit in the First Division Court of the county of Peel, against the said defendant corporation for "Sixty-five dollars paid by him to the defendant under protest, and being for an alleged income tax due for the year 1911."

6. The statement of claim and copy of summons were received by the said defendant corporation on or about the 14th day of October, 1912, and an appearance was entered in the said First Division Court of the county of Peel on the 18th day of October, 1912.

7. Under date of November 4th, 1912, the plaintiff's solicitor forwarded to the said defendant corporation a consent in the following words and terms:—

"Consent.

We hereby consent that this action, which is set down for hearing on the 7th day of November, A.D. 1912, at the hour of ten o'clock in the forenoon, at the Court House in Brampton, Ontario, be adjourned *sine die*.

It is agreed that a statement of the facts be prepared and approved by the parties hereto, and that written arguments on behalf of the plaintiff and defendant be prepared and submitted to the Judge of the First Division Court of the county of Peel.

Dated this 4th day of November, A.D. 1912." together with a request that the terms of the said consent be assented to, and enclosing an undertaking that the consent would at once be forwarded to the clerk of the First Division Court of the county of Peel, and a statement of the facts of the case would be submitted to the said defendant corporation for approval before being submitted to the Judge of the said First Division Court of the county of Peel.

8. On or about the 20th day of November, 1913, a copy of the argument for the said plaintiff was submitted to the said defendant corporation for approval, a copy having previously been forwarded to the said Judge of the First Division Court of the county of Peel.

The defendant corporation, under and by virtue of the Ontario Assessment Act, R. S. O. (1897), ch. 224, as amended by the new Assessment Act, 4 Edw. VII. (1904), ch. 23, and amending Acts, imposed an income tax upon the income of the said plaintiff. It is contended, on behalf of the said defendant corporation, that "income" as designated under the interpretation clause, being sec. 2, sub-sec. 8, as follows:

"8. 'Income' shall mean the annual profit or gain or gratuity (whether ascertained and capable of computation as being wages, salary or other fixed amount, or unascertained as being fees or emoluments; or as being profits from a trade or commercial or financial or other business or calling) directly or indirectly received by a person from any office or employment, or from any profession or calling, or from any trade, manufacture or business, as the case may be; and shall include the interest, dividends, or profits directly or indirectly received from money at interest upon any security or without security, or from stocks, or from any other investment, and also profit or gain from any other source whatever."

includes all sums of money receivable as income within the meaning and intention of the section, as ascertained or defined by reasonable and proper application of the rules pro-

vided for the construction of statutes, and such section must be accepted as the expressed intention of the Legislature, except in so far as specific exemptions of income are otherwise provided.

Section 5 of the Act provides that all income derived in any manner by any "person," resident within or without the province, shall be liable to taxation, except as expressly exempted by the said sec. 5, and under the exemptions enumerated attention is referred to sub-secs. 13, 14 and 15, which alone, by specific designation, indicate persons, officials and officers intended to be exempted by this section. The section and sub-sections are as follows: "5 All real property in this province and all income derived either within or out of this province by any persons resident therein, or received in this province by or on behalf of any person resident out of the same shall be liable to taxation, subject to the following exemptions, that is to say:—

"13. The official income of the Governor-General of the Dominion of Canada, and the official income of the Lieutenant-Governor of this province.

14. The full or half-pay of any officer, non-commissioned officer or private of His Majesty's regular Army or Navy; and any pension, salary, gratuity or stipend derived by any person from His Majesty's Imperial Treasury, and the income of any person in such Naval or Military services, on full pay, or otherwise in actual service.

15. The income of a farmer derived from his farm."

The only further exemption of income provided by this section is found under sub-sec. 19, since repealed, and a new section substituted therefor, under 3 Geo. V., ch. 46, sec. 4, providing for a partial exemption from personal earnings assessable directly in respect of income under this Act to the amount of \$1,500, where such person is resident in a city or town, or to the amount of \$1,200, where such person is resident in any other municipality, if such person is a householder in the municipality and assessed as such, or, being the head of a family, occupies with his family any portion of a dwelling-house, although not assessed therefor; and the annual income derived from personal earnings or from any pension, gratuity or retiring allowance in respect of personal services, of any person not being such householder or head of a family, to the amount of \$600, where he is resident in a

city or town, and to the amount of \$400, where he is resident in any other municipality.

It is submitted that the intention of the Legislature is clear in the meaning expressed by the terms "income," and that the specific designation under sub-secs. 13, 14 and 15 of the Governor-General, Lieutenant-Governor of this province, officers, non-commissioned officers or privates of His Majesty's regular army or navy, and the income of a farmer derived from his farm, indicate that the Legislature's intention as expressed must be taken to imply that consideration was given to all positions and walks of life, and that all classes of persons, officials and officers of the Crown were included for the purpose of taxation as to income as evidenced by direct designation within the Act.

Further provision is made under sec. 7, to bring all persons or officers of the Crown within the scope of taxation on income by abolishing exemptions previously enjoyed in so far as subsequent appointments were concerned, as follows:—

"7. The exemption to which certain officers connected with the Superior Courts were, at the time of their appointment, and on the 5th day of March, 1880, entitled by statute, in respect of their salaries, is abolished as respects all persons appointed by the Lieutenant-Governor to such offices after the said 5th day of March, 1880, and shall continue in respect of such officers only as were appointed before that date. 4 Edw. VII., ch. 23, sec. 7."

The officers referred to in sec. 7, are the Master in Ordinary, the Registrar, the Referee, the Clerk of the Master's office, and the Clerk of the Registrar, and are provided for by "An Act respecting the Court of Chancery," R. S. O. (1877), vol. I., ch. 40, sec. 15. Under sub-sec. 2, of sec. 15 it is provided that the salaries of the officers specified and all officers of the said Court, shall be paid free from all taxes and deductions.

It is submitted that the exemption of these officers of the Court was such an expression of implicit designation of the intention of the Legislature, at the passing of this statute, that it must be accepted as an exemption extending only to those officers named, and no expression direct or indirect within the Act included in such exemption the members of any branch of the Judiciary of Ontario.

Section 10 of the Act makes provision for taxation irrespective of any assessment of land under this Act of every

person occupying or using land in the municipality for the purpose of any business mentioned or described in the section for an assessment of a sum to be called "business assessment" to be computed by reference to the assessed value of the land so occupied or used, as therein provided by the various sections and sub-sections. The sections referred to embrace all manner of business capable of being carried on, including, under the term "business," the practice of professional men. The imposing of a "business assessment" is a further indication of the intention and purpose of the Act, in that the creation of a "business assessment" was a distinction of a class of assessment as contrasted with "income assessment," and the use of the words "person" or "business" in this section relates to the individuals engaged in, and the trade, calling or profession indicated. This section does not infer that the classes mentioned include all manner of means of livelihood, nor can it be argued with any degree of certainty that all sources of income are included in its provisions.

Further provision for assessment of income appears in sec. 11, as follows: "11. (1) Subject to the exemptions provided for in Sections 5 and 10 of this Act, the following persons shall be assessed and taxed in respect of income:—

(a) Every person not liable to business assessment under section 10, and

(b) Every person although liable to business assessment under section 10, shall also be liable in respect of any income not derived from the business in respect of which he is assessable under that section.

(c) Every person liable to business assessment under clause (f) of sub-section 1, of section 10 in respect of the income derived by him from his business profession or calling, to the extent to which such income exceeds the amount of such business assessment.

(2) Where such income is not a salary or other fixed amount capable of being estimated for the current year, the income of such person for the purposes of assessment shall be taken to be not less than the amount of his income during the year ending on the 31st December then last past. 4 Edw. VII., ch. 23, sec. 11."

This section provides the concluding expressed intention of the Legislature in completing the series of assessment of income by sub-sec. (a), which includes every individual not

included in any other section of the Act and not directly exempted from income tax by its own provisions.

Under sec. 12, sub-sec. 1, authority is given a municipality to assess every person, in respect of income, who resides in the municipality, or has his office or place of business therein. "12.—(1). Subject to the provisions of sub-sec. 3 of sec. 36 of this Act, every person assessable in respect of income under sec. 11 shall be so assessed in the municipality in which he resides, but may be so assessed in such municipality, either at his place of residence, or at his office or place of business: 4 Edw. VII. ch. 23, sec. 12, (1); 7 Edw. VII. ch. 41, sec. 2."

It is respectfully submitted that the sections herein recited did and do include the station, rank, office and dignity bestowed upon the members of the Judiciary as officers or officials of the Crown, and that the intention of the Legislature at all times, as expressed by the provisions of the statutes, was the inclusion of the individual within its sections, and that its exemption of any body of men was always specific and not by inference. Had the Legislature so chosen, the mere mention of a Judge or Judges as being exempt from taxation for income would have definitely released them from the burden otherwise imposed, as was done by sec. 5, sub-secs. 13, 14 and 15, by enumerating as the Legislature did enumerate the Governor-General, Lieutenant-Governor, and other officers and officials and classes of men. It may be argued that a "Judge" or "Judges" are not "persons" within the meaning of the Act, yet, the interpretation clause discloses no attempt upon the part of the Legislature to limit or construe the meaning, definition or significance generally given and accepted by all authorities as to the proper and reasonable use of the term. Income is peculiar to individuals, and assessments made against persons for such purpose must be construed in the individual sense, unless reasonable precaution has been made to restrict its construction.

What distinction then can be drawn between the use of the word "officers" in paragraph 7 previously cited, and that of "Judge" or "Judges" as officers of the Courts for the purpose of this Act? This seems the remaining distinction, if any such distinction can be assumed to exist, in further interpretation of the word "person," and respectfully submitted as interchangeable with and synonymous of the word "individual." Judges preside as the highest officers and

dignitaries of our judicial system, and in their presence does the Court subsist. Officials of inferior grade and standing are necessary for the efficient handling of the business before the Courts, and the fact that sec. 7 designated the inferior official as exempt to the exclusion of the superior can clearly be relied upon as evidence of the distinction of the exemption provided for the purpose of the Act, and that "Judges" were not intended to be among the individuals exempt from income taxation.

It is submitted for consideration that the law does not exempt the income of Judges or other federal officials, as decided in the following cases:

(1) *Webb v. Outrim* (1907), A. C. 91. This was an appeal from a judgment of the Supreme Court of Victoria, which upheld the respondent's objection to being assessed by the Victorian State income tax in respect of his salary as a federal official. It was held that the respondent, an officer of the Australian Commonwealth resident in Victoria, and receiving his official salary in that state, is liable to be assessed in respect therefor for income tax imposed by an Act of the Victorian Legislature. In giving judgment, their Lordships say: "It is impossible to suppose that the question now in debate was left to be decided upon an implied prohibition when the power to enact laws upon any subject whatsoever was before the Legislature. For these reasons their Lordships are not able to acquiesce in the reasoning of the High Court judgments governing the judgment under appeal. They will, therefore, humbly advise His Majesty that the judgment of the Superior Court of Victoria ought to be reversed, that it ought to be declared that the salary in question was rightly included in the said assessment and was liable to income tax, . . ."

(2) *Abbott v. City of St. John*, 40 S. C. of Can. Rep. This was an appeal from the Supreme Court of New Brunswick on the interpretation of the powers designated under section 91 and section 92 of the British North America Act (1867), when it was held that a civil or other officer of the Government of Canada may be lawfully taxed in respect of his income as such by the municipality in which he resides.

Davies, J., in delivering judgment, said:—"Now, it seems to me the questions before us are, first, whether or not the power to legislate upon the subject of taxation given to the province are wide and broad enough to cover the cases of

Dominion officials resident within the province; and if they are, whether or not such power is in conflict with or inconsistent with the powers given to the Dominion Parliament under the 91st section."

"Section 92 gives the Provincial Legislatures 'power exclusively to make laws in relation to matters coming within the classes of subjects next hereinafter enumerated. Sub-section 2. Direct taxation within the provinces in order to the raising of a revenue for provincial purposes.'

Now, it does not seem to me open to argument that these words are large and broad enough to cover a provincial income tax reaching all residents of the province.

Unless, therefore, there is some implied exception, or some conflict with the power given to the Dominion Parliament, under the 91st section, there would be an end to the case.

Such conflict, however, it is contended, is found in subsec. 8 of sec. 91: 'the fixing of and providing for the salaries and allowances of civil and other officers of the Government of Canada.'

I am unable, however, to see any necessary conflict between the two powers conferred.

The Dominion fixes and provides the salary, and the Province says: 'You shall pay to us the same income tax upon your salary as all other residents of the Province have to pay upon their incomes.'

The conflict is to my mind an imaginary one. The Province does not attempt to interfere directly with the exercise of the Dominion power, but merely says that when exercised the recipients of the salaries shall be amenable to provincial legislation in like manner as all other residents."

It is said, the Legislature might authorize an income tax denuding a Dominion official of a tenth or even a fifth of his official income, and in this way paralyse the Dominion service and impair the efficiency of the service. But it must be borne in mind that the law does not provide for a special tax on Dominion officials, but for a general indiscriminating tax upon the incomes of residents, and that Dominion officials could only be taxed upon their incomes in the same ratio and proportion as other residents.

I fail to find any provisions in our British North America Act exclusively vesting in its Parliament or withdrawing from the Provincial Legislatures the power of taxing incomes

earned within the state, whether by Dominion officials or others."

(3) *Dugas v. Macfarlane* (1911), 18 Western Law Reporter, (Canadian) 727.

This was an action brought by a Judge of the Territorial Court seeking to have it declared that the income and living allowance of a Judge of the Territorial Court of the Yukon Territory was not taxable by a municipality; and it was held, under the authorities, that the salary of a Judge is in the same position as the salary of any other officer of the Dominion Government, and liable to income tax. In delivering judgment, Craig, J., said:—"One of the main questions raised by the plaintiff was as to the salaries of Judges being not liable to taxation. I think perhaps I need not go into this either, as I view the law, but as it was argued as the main question, I should perhaps deal with it. If I am to follow the case of *Leprohon v. City of Ottawa*, 2 A. R. 522, I would hold that the salary is not taxable, but I think I am bound by the cases of *Abbott v. City of St. John*, 40 S. C. R. 597, and *Webb v. Outrim* (1907), A. C. 81. If the salary of a Judge is in the same position as the income of any other officer of the Dominion Government living in a municipality subject to income tax, then the income of a Judge, under the decisions in these cases, is liable to taxation. The only argument urged against this is the argument of public policy, and the case which I am considering and the position of the Judges here in this territory as applicable to this case is a striking example of the force of that argument. The position of the Judges has been guarded in many ways, and their independence guarded in many ways, which I need not recite, but which are within the knowledge of all lawyers. I might cite the many Acts of Parliament which provide for their independence and the non-impairment of their incomes, and especially our own Federal Act, which provides that the income of Judges shall not be impaired by any federal tax. But, I think these citations would not have any effect, in the face of these decisions, if, as I say, the income of a Judge is in the same position as that of any other officer of the Federal Government. Now, while public policy might be a very good argument to address to a political body or legislature, I do not think, as a Judge, that I can consider it unless I can find direct authority to support me. I am not in the position of a legislator. The local Parliaments and Legislatures, with-

in their jurisdictions, have as full and ample power, I think, as the Imperial Parliament has, and I need not extend the argument along these lines any further than to refer to the cases lately decided in the Ontario Courts, namely: *Smith v. City of London*, 20 O. L. R. 133, and *Beardmore v. City of Toronto*, 20 O. L. R. 165; 21 O. L. R. 505.

Local Legislatures have power to tax income. Judges are officers as defined by the Act; and until the direct question as to Judges' salaries as distinguished from other officers come up in a higher Court, I feel that I am bound by the decisions I have cited."

In conclusion, it is submitted that, in view of the existing state of the law in Canada on this question, and for other reasons herein set forth, we should wait for a settlement of the law by a decision of the Privy Council, and; in the meantime, your Honour should be guided by and follow the case of *Webb v. Outtrim*, as decided by the Privy Council, and followed in the cases of *Abbott v. City of St. John*, as decided by the Supreme Court, and *Dugas v. Macfarlane*, and give judgment for the defendant with costs.

William Johnston, solicitor for defendant.

INTERNATIONAL JOINT COMMISSION.

IN RE APPLICATION FOR APPROVAL OF THE
KETTLE FALLS DAM.

Dissenting opinions of H. A. Powell and C. A. Magrath,
Commissioners.

Mr. Powell:—The application in this case was for the approval by the International Joint Commission of a contemplated dam at Kettle Falls. The falls are situated on the Kettle River at its entrance into Rainy Lake. Kettle River is a boundary water between the province of Ontario and the State of Minnesota.

The application was made, with the assent of the United States, by the Rainy River Improvement Company. The dam across the river has been authorized by the United States, and the necessary approval by the department of the United States Government charged with the duty of looking after obstructions in navigable waters has been secured. A dam across the river has also, it is claimed been authorized by the Parliament of Canada, but on conditions that have not yet been fulfilled. The charters were granted to different companies which, however, are acting in unison. The application came up for consideration at a session of the Commission held at Ottawa in the month of October last, when the Commission of its own motion raised two objections to considering it:

1. The Commission has no jurisdiction in the matter, as the dam, the approval of which is sought, commences at the United States shore, and extends across the river to the opposite bank.

2. The United States Congress and the Parliament of Canada, have passed concurrent legislation authorizing the erection of the dam, and consequently there is no dispute to adjust.

A third objection was urged before the Commission to the consideration of the application at the present time, viz.: both the United States and the Canadian Governments have referred to the Commission for investigation and report the question of the level and use of the Lake of the Woods and its tributary waters; and the question of a dam at Kettle Falls is involved in this larger question.

The first objection is based on Article III, and the first paragraph of Article VIII, of the Treaty which read as follows:—

ARTICLE III.

“It is agreed that, in addition to the uses, obstructions and diversions heretofore permitted or hereafter provided for by special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

“The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other, to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbours, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line, and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

ARTICLE VIII.

“This International Joint Commission shall have jurisdiction over and shall pass upon all cases involving the use or obstruction or diversion of the waters with respect to which under Articles III. and IV. of this Treaty the approval of this Commission is required, and in passing upon such cases the Commission shall be governed by the following rules or principles which are adopted by the high contracting parties for this purpose.”

The first two objections were set down for argument before the Commission at Washington in November, 1912, when they were ably argued by the different counsel engaged.

I will discuss these objections in the order above stated.

The arguments against the jurisdiction of the Commission, so far as the first objection is concerned, were based upon the following words of section III: "obstructions on either side of the line affecting the natural level or flow of boundary waters on the other side of the line," and it was contended that these words do not include structures which extend beyond the boundary line or across the whole boundary waters, and affect the flow on both sides of the line. This contention, I must confess, I cannot appreciate.

The Commission has jurisdiction over all obstructions on each side of the boundary line at Kettle Falls which affect the flow or level of water on the other side. It is unnecessary to define the word "obstruction," but it may consist of, among other things, a sand bank formed by the water; a vessel which has been abandoned; a structure accidentally in the river or designedly placed there; and a part of the bank or a part of the vessel, or a part of the structure may and the remaining portion may not be an obstruction. If the question were asked: "Is there anything on the United States side in the contemplated dam which would affect the flow or level of the waters on the Canadian side," there could only be one answer,—“Yes, the whole of the work on the United States side will do so.” If the further question were asked: "Is there anything in the contemplated structure on the Canadian side which would similarly affect the waters on the United States side," there could only be one answer to this question also.—“Yes, all that portion of the work which lies in Canadian waters will do so.” That each portion is organically or structurally connected with the other, and plays its part in disturbing the whole width of the river cannot alter this plain fact, that it is an obstruction on one side which affects the level or flow of the waters on the other. Not only is each portion an obstruction in fact, it is also an obstruction in law, and the Courts of the country in which it is situate can abate it as such. Each portion of the dam is therefore an obstruction within the meaning of Article III, an obstruction on one side which affects the level or flow of the water on the other side of the boundary line. The dam by reason of its two portions producing these analogous or reciprocal results must be looked upon as coming within the very words of the Treaty. By Article VIII of the Treaty above quoted "all cases" involving obstructions so affecting the flow or level of the

river are within the jurisdiction of this Commission and it is the duty of the Commission to "pass upon" them. Unless there is something in the context of the Treaty which is inconsistent with this construction or unless it would lead to manifest absurdity, it must prevail.

After a most careful analysis of the Treaty, and the fullest consideration of the results which would flow from the adoption of this construction, I have failed to detect any inconsistency or absurdity. I would rest my judgment, so far as this objection is concerned, on this statement of the case; but, inasmuch as the views of some of my colleagues differ from those I have expressed, and the adoption of these views would greatly restrict the judicial powers of the commission and its usefulness, I will discuss briefly the argument adduced by counsel in support of the first objection and the results which would flow from the construction of Article III for which they contended. This construction involves reading into the article as a qualifier of the word "obstructions" the words "which have no physical or structural connection with the obstructions on the other side of the boundary line." It was argued that we must look at Article III, in the light of the "principle or policy" of the Treaty and that the article when so viewed does not apply to a work situate on both sides of a boundary water. This principle or policy must be gathered from the Treaty itself, a task which is very difficult since a treaty is ordinarily a mosaic of compromises founded not on principle but on expediency. The eminent jurists who framed the Treaty did not formulate what they regarded as the best conceivable arrangement, but what they felt was the best arrangement acceptable to all parties. The most careful scrutiny, however, will not reveal any principle or policy which would prevent the Treaty applying to such a work. On the contrary the principle or policy of the Treaty gathered from the Treaty itself, is simply an intention to devolve upon the Commission among other questions touching obstructions just such questions as are involved in this application.

Another contention was that the Commission should construe the Treaty in view of the legal situation with regard to boundary waters which existed at the time the Treaty was entered into.

There were or could be, in the legal situation as it then was (as there are or can be in the present legal situation).

two classes of obstructions on each side of the boundary line which affected the flow or level of the waters on the other side—first, entire structures; second, portions of structures the remainders of which lay on the other side of the line. Before the Treaty both classes when situate within the territory of the same country had national and international features in respect to all of which they stood precisely on the same footing, both in the eyes of international law and the law of that country and were alike in respect to the procedure for their abatement and for their legalization. It is a necessary corollary to this proposition that the obstructions constituted by the remaining portions of the structures and the obstructions of the first class situate on the other side of the line, were also precisely similarly circumstanced in these respects.

To be more specific—at the time the Treaty was entered into a work situate entirely on the Canadian side and an obstruction on the same side which formed a portion of a work extending into United States waters were subject to the same laws, common and statutory, of Canada, and were subject to the same principles of international law. Under the laws of Canada the Courts and proper legislative powers could abate the obstructions and the international law applying to each obstruction was to be worked out by the slow and unsatisfactory expedient of diplomatic negotiation.

The same statement is true *vice versa* with respect to an obstruction entirely situate on the United States side, and that portion of the structure mentioned which was situate on the United States side. The Treaty deals with the international phases of obstructions—hence the use of the words in Article III: “obstructions on one side of the boundary line which affect the level or flow on the other side of the boundary line.” This language is a very succinct and exact method of describing the obstructions which at the time of the adoption of the Treaty were of international significance.

The Treaty substituted the Commission for the diplomatic machinery which was previously required to supplement and even vary the action of the Courts and legislatures of the different countries. Its provisions making the substitution and conferring jurisdiction upon the Commission will be found upon careful examination to be most skilfully

drawn, and admirably designed to make the substitution with as little disturbance as possible of the principles of law and international jurisprudence which previously applied to boundary waters.

On the other hand the construction of Article III. contended for by counsel opposing the application creates a distinction in the case of the second class of obstructions above mentioned, which was anomalous, entirely unnecessary and had been previously unknown. In fact the construction is inconsistent with the results which the practical application of the Treaty unquestionably works out. This will appear from the following case.

Were an application made for the approval of a work (a wing dam, for instance), at the falls stretching from the United States bank to the boundary line, there could be no question as to the jurisdiction of the Commission to grant approval.

If after its construction approval was asked for another work (another wing dam for instance) on the Canadian side commencing at the shore and abutting on the outer end of the first wing dam, but having no structural connection or community of interest therewith, the granting of such approval would undoubtedly be within the power of the Commission.

Assuming that approval of the second wing dam has been granted and the wing dam constructed, and that the owner of the one wing dam has purchased the other wing dam, and used the two as contributory to a common purpose, then we would have what is practically one dam stretching from shore to shore. The only difference between this and the dam, the approval of which is now sought, is there would be a seam in the former that would be absent in the latter, through which there might be a possible leakage or run of water. There is nothing in the Treaty express or implied, preventing one person making application for both wing dams. He might also consolidate the two applications into one as this would be a mere matter of procedure. On this consolidated application, the Commission would have the power to grant approval of both wing dams. The approval of the United States portion could be granted on the ground that it was an obstruction which disturbed Canadian waters, and the Canadian portion could be approved on the ground that it disturbed United States waters. The situation would

be analogous to that of an ejectment or trespass suit in which the *locus in quo*, though completely covered by one building, consists of two pieces of land, the titles to which are derived from two different sources. We have therefore in this supposed case practically the case before us. What is for all practical purposes one continuous dam across the river is approved of in two sections on the one application.

The few supposititious cases following, taken from a number which suggest themselves, will further illustrate the absurdity which would result from the acceptance of the construction which the first objection calls for:

1. A vessel sinks in boundary waters, is abandoned, and lies on the bottom across the boundary line. If the objection is well founded the Commission has no jurisdiction over the whole or any portion of the vessel, as the vessel is an obstruction situate in and affecting the flow on both sides of the boundary line.

2. Two wing dams, such as I have supposed, are built in a boundary stream. They extend to and meet in the centre but have no organic connection or community of object, or purpose. There is necessarily a seam between the two. We unquestionably have jurisdiction over each dam. Why should we not have jurisdiction over the work if the piers were structurally or organically connected? The only difference is that in the one case there might be a leak or flow of water through the dam which would not exist in the other. Surely it could not be seriously contended that it would be necessary to invoke the sovereign powers of Great Britain and the United States to stop the leak.

3. A bridge of solid crib work is built across a boundary river. Such a structure, if the objection is good, is not within our jurisdiction, but if a waterway however narrow, is cut through it on the boundary line the remaining portions are thereby brought within the jurisdiction of the Commission.

4. A pier which permits the passage of water on either side and interferes with the level and flow on both sides, is erected on the dividing line of a boundary river. If the objection is well taken, we would not have jurisdiction, but if the pier should be displaced so that it became contiguous to the boundary line, but wholly on one side of it, it would require our approval.

5. An embankment is constructed from the Canadian side to the boundary line of the river, but no farther; it is certainly within our jurisdiction. But if the owner desires to place himself outside of our jurisdiction, he need only, if such objection is well taken, extend his work an appreciable distance on the other side of the boundary line and his purpose is accomplished.

The *argumentum ad absurdum* might be pushed even further. The language of Article III. of the Treaty with respect to obstructions is "on either side of the line," and the language with respect to disturbances of level and flow is "on the other side of the line."

If the words "on either side of the line" when applied to obstructions exclude an obstruction which is part of a structure extending to the other side of the line, why should the words "on the other side of the line" when applied to a disturbance of the level or flow of the water not be confined to cases where the disturbance is exclusively on the other side of the line? There is no conceivable reason why the limitation of the words should not be made in the case of disturbances or effects, if it is made in the case of the obstructions or causes. As a matter of fact, obstructions on one side affecting the level or flow on the other side of a stream unavoidably affect the level or flow on the same side of the stream, and if this limitation is made, the result would be that the Commission would have no jurisdiction at all in respect to obstructions of the level or flow of streams.

So multitudinous are the absurd results which would flow from this construction were it adopted, that the Treaty, which is a wise and statesmanlike contrivance admirably designed to afford a simple, inexpensive and expeditious means of adjusting disputes which might engender ill-feeling between the two countries, would become, to use the quotation made by Lord Denman in the celebrated O'Connell case, "a mockery, a delusion and a snare."

It was also argued before the Commission that we have no jurisdiction since the applicant had not obtained authority from Canada to build the dam across the river, or even in Canadian waters. The answer to this argument is three-fold. In the first place, this objection, if valid, would only extend to that portion of the dam situated in Canadian waters, and not affect our jurisdiction so far as the portion in the United States waters is concerned. It was suggested that to

authorize only half or some other fractional portion of the dam would be an act of folly never contemplated by the Treaty. If it be conceded that such an authorization would be an act of folly, it can not reasonably be argued that this "folly" in the applicant's case would deprive the Commission of the jurisdiction to adjudicate upon it, however certain it might be that we would decide against the application. In the second place, the authority of Canada is not (as will appear by reference to Article III.) a condition precedent to jurisdiction; it is only a requirement to be observed before the work is completely legalized, and could be obtained either before or after the giving of our approval. Prudent applicants in ordinary cases would obtain such authority before applying to the Commission, and the Commission might require that such authority be first obtained. The Commission might also follow the course frequently pursued by Courts of Equity in analogous cases and make its approval conditional on the applicant's receiving such authority. However much the absence of such authority should influence the Commission in refusing to exercise its power it cannot denude the Commission of its jurisdiction. In the third place it is scarcely open to those opposing the application to say that Canada has not authorized the work when they are putting forward as a separate contention the claim that Canada has authorized the work and that the authorization goes to the extent of a "special agreement."

It was also argued before the Commission that inasmuch as the proposed dam stretches across the whole Kettle River, the United States and Canada respectively would, even in giving authority under Article III. for the construction of the portions of such work situate in their respective territories, necessarily assent to and give authority for the construction of the work as a whole; that all international questions respecting it would be settled by the giving of such authority by each; and that the dam would not be within the jurisdiction of the Commission. There is a subtle fallacy lurking in this contention which comes to the front when Article III. is construed in connection with Article XIII.

Taking these sections together, the situation with respect to the authority necessary to erect obstructions in boundary waters may be stated in three propositions:

1. By the second paragraph of Article III. either country has absolute authority to erect wholly in the waters on its own side of the boundary certain structures connected with commerce and navigation, provided they do not affect the flow or level of the waters on the other side of the boundary line.

2. By the first paragraph of Article III. either contracting party has authority to permit any obstruction whatever to be erected in the waters on its own side of the boundary line which so affects the waters on the other side of the boundary line; but such authority is not absolute; it is conditional on the approval by the Commission of the obstruction.

3. By Article XIII. and the first paragraph of Article III. the High Contracting Parties have power to take any obstruction falling within No. 2 out of the jurisdiction of the Commission, and have absolute authority by a "special agreement" between them to legalize the obstruction, but this "special agreement" must be either a "direct agreement" or a "mutual arrangement" as provided in Article XIII.

It would be a difficult task to define the expression, "by authority of the United States or of the Dominion of Canada" used in Article III. Fortunately it is unnecessary to do so, for this much is clear,—the "authority" spoken of in that Article is not the authority which takes an obstruction out of the jurisdiction of the Commission. This last, is the "special agreement" referred to in Article XIII., and is derived either from a "direct agreement" between the High Contracting Parties, or from a "mutual agreement" between them, expressed by legislation as provided in that Article.

So careful is the treaty in safeguarding the jurisdiction of the Commission that unless and until the requirements of a "special agreement" are observed in any "authority" purporting to be given by Canada and the United States, individually or jointly, that "authority" must be taken as given subject to the approval of the Commission. Such "authority" is tantamount to the authority which would be given by either country or both countries by saying—"we are perfectly willing that the proposed work should be done and we authorize it to be done, provided the Commission, which has been constituted for the very purpose of considering such matters, approves of its construction." The High Contracting Parties however, have not finally abdicated their powers, and if they

think investigation by the Commission is not necessary, or for any other reason they see fit to take a matter out of the jurisdiction of the Commission and themselves give authority to construct the work they can do so; but this authority must, by Articles III. and XIII. be given in and evidenced by a "special agreement," and a "special agreement" only, such as therein provided.

No person who appeared before the Commission had the temerity to argue that there was any "direct agreement" between the High Contracting Parties. Reliance was placed upon the existence of a "mutual arrangement." As this "mutual arrangement" must necessarily be discussed in treating of the second objection, I will pass on to the consideration of that objection.

Objection No. 2 rests upon Articles III. and XIII. of the Treaty, upon a Statute of Canada, and a Statute of the United States.

Article XIII. of the Treaty reads as follows:

"In all cases where special agreements between the High Contracting Parties hereto are referred to in the foregoing articles, such agreements are understood and intended to include not only direct agreements between the High Contracting Parties, but also any mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion."

The Dominion Statute is as follows:

"Whereas the Ontario and Minnesota Power Company, Limited, has by its petition represented that it was incorporated by Letters Patent under the Great Seal of the Province of Ontario dated the thirteenth day of January, one thousand nine hundred and five, under "The Ontario Companies Act," being Chapter 191 of the Revised Statutes of Ontario, 1897; and whereas the said Company has prayed that it be enacted as hereinafter set forth, and it is expedient to grant the prayer of the said petition: Therefore His Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:

1. The Company may construct, develop, acquire, own, use and operate the water power now or hereafter existing on the Rainy River, in the Province of Ontario, and construct, develop, operate and maintain works, canals, raceways, water-courses, dams, piers, booms, dykes, sluices, conduits

and buildings, in connection with the said power, including any increase of the said power on Rainy River by storage or other works on waters tributary to Rainy Lake which the Company now has or may hereafter have power to construct: provided that no work authorized by this section shall be commenced until the plans thereof have first been submitted to and approved of by the Governor in Council."

It will be noticed that the Statute says nothing whatever about a dam at Kettle Falls. The main purpose of the act is to develop the power at Fort Frances, forty-five miles distant from Kettle Falls, and the power conferred, if any, to erect a storage dam at Kettle Falls, is only incidental to the other. The authority to build a dam can only be gathered by inference and by reference to the Letters Patent issued and the leases and agreements entered into with the Company by the Province of Ontario. It is questionable whether the Statute gives any power to erect a dam at Kettle Falls, but, assuming it does do so, the power is subject to the conditions and agreements contained in the Letters Patent and agreements.

The Act of Congress relative to the matter was passed in 1911, and authorized a dam over the outlet of Lake Namakan at Kettle Falls.

It is as follows:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Rainy River Improvement Company, a corporation organized under the laws of the State of Minnesota, its successors and assigns, be, and they are hereby authorized to construct, maintain, and operate a dam across the outlet of Lake Namakan at Kettle Falls, in Saint Louis County, Minnesota, at a place suitable to the interests of navigation, in accordance with the provisions of the Act approved June twenty-third, nineteen hundred and ten, entitled 'An Act to regulate the construction of dams across navigable waters,' approved June twenty-first, nineteen hundred and six."

"Sec. 2. That the right to alter, amend, or repeal this Act is hereby expressly reserved."

It was contended by counsel opposing the application that these two statutes constitute "a special agreement" under Article XIII. of the Treaty, and that the Commission consequently has no jurisdiction to entertain the application.

Article XIII. may be looked upon as having been inserted to make clear the limitation of the authority given the Commission by Article III. The words "direct agreement" are most important. In regard to the rights of navigation possessed by the people and in regard to the rights of the riparian proprietors, the executive government of either country does not, except as an extraordinary Treaty Making Power, possess, in the absence of proper statutory authorization, the slightest power to alienate or impair them. The "direct agreement" must be regarded as being made in pursuance of this extraordinary Treaty Making Power.

The agreement, if any exists, must as I have said be a "mutual agreement" to be spelled out of the legislation of the United States Congress and the Dominion Parliament. Questions very difficult to answer suggest themselves in respect to this "legislation"—does the Treaty mean legislation only which Congress or Parliament has the power to pass? Both legislative bodies can legislate respecting navigation, but have they the power to authorize, for purposes other than those of navigation, obstructions which by changing the course or height or velocity of the stream injure the rights of riparian proprietors in their respective countries?

In view of the fact that legislative power both in Canada and in the United States is divided between the Federal legislature on the one hand and the provincial or state legislatures on the other, can the Treaty Making Power, or "a direct agreement" in pursuance of the Treaty, confer upon the federal legislatures the right for international purposes to do things which they, for other purposes, under their respective constitutions, could not do? These questions have not yet arisen in Canada: but they have been the subject of judicial consideration in the United States—The supreme authority of a treaty has been provided for by Article VI. of the U. S. Constitution, and by Section 132 of the Canadian Constitution.

Without hazarding any opinion on these questions I will assume for the purpose of argument that these legislative bodies can authorize unconditionally the construction of the dam in question, and inquire whether or not they have actually done so. Congress has by statute authorized construction of the work and the department of the United States Government which is charged with the oversight of obstructions in rivers has approved of the plans. The authorization by

that country of a dam is therefore complete. The Dominion Parliament has authorized its construction by statute embodying the condition that the plan should first be approved by the Governor in Council. The plans have not been approved; the condition has not been fulfilled. It is impossible to say that if the Governor in Council does approve of the plans referred to in the Canadian Statute that these plans will be the same plans or that the dam approved of will be on the same site as the plans and dam the United States has approved.

It was suggested during the argument that the selection of plans, sites and builders is a "mere matter of administration," and that the essential element is the authorization by both countries of the damming of the river. While it may be conceded that the selection or authorization of particular people to build the dam may be such a matter, I am far from admitting that the plans and site are such. Involved in the plans are the height of the dam and facilities for navigation through it. These and the site are elements which may be most essential from the standpoint of obstructions, and with regard to them, both countries should, so to speak, have their minds together. Let it be granted, both countries have authorized some dam to be built, but does not this authority fall within Number 2 of the above propositions, and is it not subject to the approval of the Commission? The dam crosses the whole river and the dominant features in the situation are the interference with navigation, the extent of the overflow of the riparian lands above and of the withdrawal of the water from the riparian lands below. Of all the obstructions with which the two countries may deal, such cases as the present stand out clearly as cases in respect to which investigation and approval should be given by the Commission.

But if it be assumed that the height, site, builders and construction of a dam are "mere matters of administration," is not the fact that the Statutes of Canada and of the United States are not agreed in respect to them, most important in coming to a conclusion as to whether or not there is a "mutual arrangement" expressed by "concurrent or reciprocal legislation?" It is a difficult matter of construction to determine whether the "concurrent and reciprocal legislation," so called must not be legislation which implements a preceding agreement or understanding between the powers.

If a preceding agreement is necessary there is no "mutual arrangement" as there was no preceding agreement. If a preceding agreement is not necessary, we must look to the statutes alone for the "mutual arrangement."

Comparing these statutes and conceding the doubtful claim that the Canadian statute authorizes a dam at Kettle Falls, what do we find? The Canadian statute simply authorizes a dam which the Ontario and Minnesota Power Company had, or might thereafter have, power to construct. The only power to construct appears to be by virtue of Letters Patent issued by the Province of Ontario incorporating this Company, and an agreement between the Government of Ontario and Edward Wellington Backus, by which Mr. Backus and his associates can construct a storage dam at or near Kettle Falls, subject to such regulations and conditions as may be imposed by the Lieutenant Governor-in-Council, and may raise the water above the dam to a point not higher than high water mark. The United States authorizes the Rainy River Improvement Company to build a dam across the river at Kettle Falls at a point suitable to the interests of navigation. The plans for the first mentioned dam shall first be submitted to and approved of by the Governor-in-Council of Canada, the second mentioned dam shall be in accordance with the provisions of an Act of Congress approved on the 23rd day of June, 1910. The Canadian Act has eight sections, subjecting among other things the Ontario and Minnesota Power Company to the Control of the Board of Railway Commissioners in Canada and the practice and provisions of the Canadian Railway Act of 1903. The Act of Congress reserves to Congress the right to alter, amend or repeal its statute. The Canadian Act is silent on this point, but the Canadian Parliament has the same right without any reservation.

There is not a single point touched upon in either act with respect to which the statutes agree. There is not even a solitary provision in either act which suggests that either country contemplates legislation on the part of the other, with reference to a dam. All that can be said is each country acting independently of the other has through its legislature authorized, or purported to authorize, a dam. The result is that they have really authorized two dams.

The United States has sanctioned the making of the application under which this Commission has acted. Such

a course is absolutely inconsistent with any belief on that country's part that there is a "special agreement" or "mutual arrangement" in existence. Mr. Thompson, as counsel for Canada, argued before the Commission that there was no "mutual arrangement." The fact that the governments of the two powers are of the same opinion as to the absence of a "mutual arrangement," cannot give this Commission jurisdiction, if, in fact, there was such a "mutual arrangement;" but the action of the two governments has some significance in regard to the question as to whether or not there was a "mutual arrangement." To my mind, it is one of the grossest of absurdities to claim that the legislation comes up to the requirements of Article XIII. of the Treaty. There is not in it even a suggestion of a "mutual arrangement."

To state my conclusions briefly,—the jurisdiction of the Commission in respect to an obstruction in boundary waters depends solely upon this fact: Whether or not it is an obstruction on the one side which affects the level and flow of the waters on the other side of the boundary line. The objects for which it has been constructed; the purposes which it serves; the authority under which it is created, whether private, municipal, provincial, state, national or international, unless such authority is derived from "special agreement" between the two countries; its structural character, whether earth, wood or masonry; its extent, whether it is part of a work which merely reaches beyond the boundary line or across the whole water—are important facts, it is true, but facts that can weigh only with the Commission in the exercise of its jurisdiction, and have no bearing whatever, on the question, whether such jurisdiction actually exists.

This jurisdiction exists by virtue of Articles III. and VIII., and the only authorities which could take the dam out of this jurisdiction have not done so. They have only given an authority which falls under proposition Number 2 above stated and is subject to our approval of the proposed work.

It is almost unnecessary to add that in my opinion the Commission has power to grant the approval asked for in the application.

Even if the members of the Commission have grave doubts as to its jurisdiction over this dam, it would be better to assume jurisdiction. By pursuing such a course no possible injury could be done to anyone. If on the other

hand the Commission has jurisdiction, a great deal of harm might be done by refusing to exercise it. In cases of this kind it is better to act on the old maxim, *boni judicis est jurisdictionem ampliare*.

While I am of the opinion, above expressed, I think the third objection is well taken. The proposed dam at the Kettle River Falls can not be looked upon separately from the question regarding the level and use of the water of the Lake of the Woods and its tributaries, which has been referred to this Commission jointly by the United States and Canada. Further consideration of this application should be postponed until the larger question is investigated and reported upon by the Commission.

Dated this 17th day of April, 1913.

MR. MAGRATH:

I concur with Mr. Powell in his conclusions, my reasons being that the portion of every international dam which obstructs flow on one side of the boundary must raise the water level on the other, over and above the height caused by the portion of the structure on such other side if standing alone. That is, if the entire structure consisted of two sections, suspended in the air and one was let down into the stream, fitting across that portion of the stream in one country, that obstruction would at once cause new water elevations across the stream.

Then if the other section was dropped into place, thereby making a continuous structure from shore to shore, the existing water levels would at once be forced to a still higher elevation. Therefore a dam extending across an international stream can be said to be an obstruction which "on either side of the line" affects "the natural level or flow" on the other, and consequently under Article III. of the Treaty, the International Joint Commission has jurisdiction, provided it is not being built under a "special agreement between the parties hereto"—the High Contracting Parties—as determined in said Article III.

For the interpretation of "special agreements" it is necessary to go to Article XIII., wherein it is stated: "Such agreements are understood and intended to include not only *direct agreements* between the High Contracting Parties, but also any *mutual arrangement* between the United States and Dominion of Canada, expressed by *concurrent* or *reciprocal* legislation on the part of Congress and the Parliament of

Canada," which while not presuming to legally define, I will call *identical* legislation.

Now when two nations come together and make a *direct agreement* it is known as a Treaty. Whether that holds good in every case is a matter of indifference as there will never be any difficulty in distinguishing a *direct agreement* as between the High Contracting parties—Great Britain and the United States.

But if A and B, citizens of the United States and Canada *mutually arrange* to join in the construction of say a dam across the boundary for industrial purposes, and admitting they then obtain *identical* legislation from Congress and Parliament, are we to understand that in consequence of that legislation the *mutual arrangement* of the two individuals immediately becomes a "mutual arrangement between the United States and the Dominion of Canada," constituting it nothing short of a "special agreement" between Great Britain and the United States, as called for in Article III. of the Treaty?

I find it impossible to accept that view. Such legislative authority by Congress and Parliament in favour of A and B bears on the face of it a *mutual arrangement* but only between the two individuals. There is a vast difference between this supposed case and the recent proposed trade arrangement between Canada and the United States, known as the Reciprocity agreement. That was a "mutual arrangement between the United States and the Dominion of Canada" which was to be made effective and "expressed by concurrent or reciprocal legislation upon the part of Congress and the Parliament of Canada."

Every structure intended to extend from one country into another must arise out of a mutual arrangement between the parties on both sides of the boundary, who for reasons of their own wish to erect it, and the legislative authority from Congress and Parliament will presumably express that agreement and make clear the parties between whom it exists. If these authorities moreover shew an arrangement made by the two Governments, then the Commission has no jurisdiction.

In short the Commission is without jurisdiction if (a) Great Britain and the United States, the treaty-making powers, make a *direct agreement*; or (b) Canada and the United States, who are unable to enter into a treaty, come to a mutual arrangement, which to be made effective must

be moulded into legislation, which the parties to the arrangement demanded should be concurrent or reciprocal, and which the circumstances would naturally require to be identical.

It cannot be argued, and in fact is not urged, that the proposed obstruction has been "heretofore permitted" within the meaning of Article III. of the Treaty, and it seems impossible to understand how it can be regarded under the same article as being "hereafter provided for by special agreement between the parties hereto," which interpreted by Article XIII. means hereafter provided for by "mutual arrangement between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion," especially when the legislative authority from Parliament was obtained in 1906, four years before the Treaty came into force, while that from Congress was secured after the Treaty came into force. In my opinion the present case then does not fail within either of the above categories.

Assuming that identical legislation by Congress and Parliament relieves the Commission of its jurisdiction, is it not a fact that laws enacted by a legislative body frequently are not absolutely identical with the bills as presented to that body? If that is so, is it unreasonable to suggest that while two identical bills may be presented to two different legislatures, there is still greater possibility of want of harmony in the finished products as acts of those legislatures? Does not the duty therefore devolve upon the Commission of at least seeing that the authority of Congress and Parliament is *identical*. In the matter of the application under consideration, that has not been done as the application from the Canadian side has not yet reached the Commission, though the Commission has knowledge of the fact that the applicants have been moving to that end.

If the Commission is to take the position that it has no jurisdiction substantially because there is legislative authority from both Congress and Parliament, that attitude it appears to me would if applied to the case of a proposed obstruction on one side of the boundary only, affecting "the natural level or flow" on the other—where the Commission admits its jurisdiction, and for which there must be legal authority from either Congress or Parliament, preclude the riparian owners and state or provincial authorities on that

side of the boundary, with undoubted rights in the waters affected, from appealing or otherwise being heard by the Commission when dealing with the matter. Such a course would hardly lead towards the attainment of the best results in at least one object of the Treaty as expressed in its preamble, namely the prevention of "disputes regarding boundary waters."

The Treaty was entered into for a purpose—namely to facilitate the management, in the interests of the two countries of a great asset, common to both,—the boundary waters, and which can only be accomplished by the two Governments through the agency of some such tribunal as the Commission. Therefore I can hardly conceive that it was the intention of those Governments to withhold from the Commission a large proportion of the questions—obstructions crossing the boundary—that may likely arise along those international waters.

Under "The Rules of Procedure of the International Joint Commission," Rule 6 provides, that "private persons" seeking the approval of the Commission for the use, obstruction or diversion of boundary waters, "Shall first make written application to the Government within whose jurisdiction the privilege desired is to be exercised, to grant such privilege, and upon such Government or the proper Department thereof transmitting such application to the Commission, *with the request that it take appropriate action thereon, the same shall be filed and proceeded with by the Commission,* in the same manner as an application on behalf of one or other of the Governments."

In the case of a structure extending across the boundary, there must of necessity be an application on each side thereof, and if those applications come forward to the Commission from the two Governments "for appropriate action," it appears to me open to very grave doubt indeed if the Commission could under such circumstances refuse consideration by denying its jurisdiction.

That seems to be the situation in this application of the Rainy River Improvement Company. It was submitted to the Commission by the State Department at Washington "for appropriate action," and Mr. Thompson representing the Attorney-General of Canada practically admitted the jurisdiction of the Commission in his statement to it dated 13th November, 1912, wherein he asked that the application

be delayed and added that the Government of Canada had not yet approved of the plans of the applicants. Further, when dealing with the question at the meeting of the Commission at Washington a few days later, Mr. Thompson strongly argued that the Commission had jurisdiction in this case. In short, no application can reach the Commission under its rules except through its principals—the United States and Canada—and the submission to the Commission of applications by them might fairly be regarded as a denial by them of any *mutual arrangement* between them even though the legislative authority of the applicants by Congress and Parliament is identical in every respect.

I am therefore unable to see anything in this case to cast doubt upon the jurisdiction of the Commission, and in reaching that conclusion I do so with full deference and respect to the opinions of my colleagues who hold a different view.

Dated this 17th day of April, 1913.

INTERNATIONAL JOINT COMMISSION.

IN THE MATTER OF THE APPLICATION OF THE RAINY RIVER IMPROVEMENT COMPANY FOR APPROVAL OF PLANS FOR DAM AT KETTLE FALLS.

Filed under Article III. of the Treaty between the United States and Great Britain, May 5, 1910. Opinion filed April 18, 1913, at Washington and Ottawa.

This application was filed under the provisions of Article III. of the treaty, a copy of which follows:

ARTICLE III.

It is agreed that in addition to the uses, obstructions, and diversions heretofore permitted or hereafter provided for by the special agreement between the parties hereto, no further or other uses or obstructions or diversions, whether temporary or permanent, of boundary waters on either side of the line, affecting the natural level or flow of

boundary waters on the other side of the line, shall be made except by authority of the United States or the Dominion of Canada within their respective jurisdictions and with the approval, as hereinafter provided, of a joint commission, to be known as the International Joint Commission.

The foregoing provisions are not intended to limit or interfere with the existing rights of the Government of the United States on the one side and the Government of the Dominion of Canada on the other to undertake and carry on governmental works in boundary waters for the deepening of channels, the construction of breakwaters, the improvement of harbors, and other governmental works for the benefit of commerce and navigation, provided that such works are wholly on its own side of the line and do not materially affect the level or flow of the boundary waters on the other, nor are such provisions intended to interfere with the ordinary use of such waters for domestic and sanitary purposes.

The commission, after inquiry and consideration, felt it necessary to call upon the parties to discuss before it the question as to whether upon the facts as they appear on the record, the case was one which fell within their jurisdiction under the terms of the treaty. Accordingly, on the 18th November, 1912, at Washington, the parties were heard upon the question of jurisdiction, and the commission took further time to consider.

The conclusion to which the commission has come will appear by the following:

On the 9th January, 1905, Edward Weillington Backus entered into an agreement with His Majesty, represented by the Commissioner of the Crown Lands of Ontario, by which were given to him, among other rights and powers, the following:

12. The purchasers shall have the right to construct a storage dam at or near Kettle Falls at the outlet of Lake Namakan and also at the outlet of the Lower Manitou Lake and of Big Turtle Lake, subject to such regulations and conditions as may be imposed by the Lieutenant Governor in council, and may raise the water of the said lakes to a point not higher than the high-water mark, as ascertained by an officer appointed by the Government, and maintain them at such point; and the Government agrees to lease to the said

purchasers in perpetuity, at a rental of one dollar (\$1.00) per annum, such an area of land as may be found necessary at or near the said Kettle Falls, for the purpose of constructing the said storage dam or other necessary works or structures in connection therewith.

On the 13th January, 1905, letters patent were issued to Mr. Backus and others, constituting them under the Ontario Companies Act a corporation under the name of "The Ontario & Minnesota Power Co. (Ltd.)," and among other powers given by the said letters patent to the said company were the following:

(i) To acquire, purchase, take and hold all the rights, favours and privileges, franchises, benefits, water powers, contracts, or other property, under a certain agreement bearing date on the 9th day of January, A.D. 1905, between His Majesty the King, represented by the honourable the Commissioner of Crown Lands for the Province of Ontario, of the one part, and the said Edward Wellington Backus and his associates, of the other part, and to assume the obligations, liabilities, conditions, and undertakings by the said agreement assumed by the said Edward Wellington Backus.

By the Dominion Statute 4-5 Edward VII., chap. 139 (sanctioned 20th July, 1905) the above-named corporation was empowered to construct, develop, acquire, and operate the water power now or hereafter existing on the Rainy River at or near the town of Fort Frances, and construct, develop, operate, and maintain works, canals, raceways, water courses, dams, piers, booms in connection with the said water power, including any increase of the said water power on Rainy River by *storage* or other works on *waters tributary* to Rainy Lake, which the company "now has or may hereafter have power to construct."

This authority, however, was subject to the approval by the Governor General in council of all plans for the building or construction of the works authorized.

The Rainy River Improvement Co., a corporation organized under the laws of the State of Minnesota, have applied to the commission "for approval of plans for a dam at Kettle Falls."

The application has constantly been referred to before the commission as an application for the approval of a dam at Kettle Falls across the boundary waters from the American shore to the Canadian shore, and the application gives one

of the objects of the construction to be "to improve and so far as practicable to flood out the rapids at the mouth of Rainy Lake, and to equalize so far as practicable the water of Rainy River from the source to its mouth, and prevent the water from falling to its natural low-water stage."

The application moreover refers specifically to and is based on the act of Congress of February 24, 1911, which empowers the Rainy River Improvement Co. "to construct, maintain, and operate a dam across the outlet of Lake Namakan at Kettle Falls."

The application, which has been pending before the commission since the 2nd April last, has been duly notified to the Government of Canada, and counsel for the Ontario & Minnesota Power Co. (Ltd.) have appeared before us and stated that they have been endeavouring to obtain from that Government the approval of plans submitted for the construction of a dam at Kettle Falls which will join that portion of the dam to be constructed at the same place, on the American side, by the Rainy River Improvement Co. In fact, it has been stated to the commission, and the commission is in full possession of the fact, that these two applications, one of which, the American application, was approved by the Secretary of War, and the other, the Canadian application, is before the Department of Public Works for approval, have a common object, viz., the building of a dam across the boundary waters at the point in question.

The authority conferred by the agreement of the 9th January, 1905, upon Mr. Backus and his associates by the letters patent of the 13th of January, 1905, and the Dominion Statute of 1905, is to build a *storage* dam at or near Kettle Falls, at the outlets of Lake Namakan, of Lake Lower Manitou, and Big Turtle Lake, for the purpose of raising and maintaining the waters of these lakes at or "to a point not higher than the high-water mark."

One of the considerations upon which this grant is made is thus expressed in the agreement.

And whereas the said water power can be more advantageously developed and more power produced by works embracing the entire width of the river and dealing with it as a whole, than by an independent development on the Canadian side of the international boundary, and it is therefore in the public interest to adopt such a plan of development.

And whereas the purchasers (Backus and his associates) are the owners in fee simple of the lands and water power on the Minnesota side of the international boundary opposite the said town of Fort Frances, and are desirous of obtaining from the Government of the Province of Ontario a grant in fee of the lands and power on the Canadian side of the international boundary, for the purpose of developing the water power to the full capacity of the stream from side to side at high water mark, and of utilizing such storage facilities as may be available for maintaining the river at such high water mark, thereby rendering available a large amount of power on the Canadian side of the river, for municipal purposes and for the operation of pulp and paper mills, flour and grist mills and other manufacturing establishments.

The same Mr. Backus who appears as one of the incorporators of the Ontario & Minnesota Power Co. is also one of the incorporators and the president of the Rainy River Improvement Co., and it was stated over and over again to the commission by counsel for both companies, which are really one and the same group under different names, that the object of the application was to construct a dam across the boundary waters and that there was no question of constructing a dam on one side only; in fact it was suggested to the commission that it give its approval conditionally upon authority being subsequently obtained from the Dominion Government to build on the Canadian side.

The application is therefore not one respecting the "use, obstruction, or diversion" of boundary waters on one side of the line the effect of which would be to affect "the natural level or flow" on the other side; admittedly, the purpose in view is the obstruction of the whole river with the result that the natural level or flow of the waters will be affected on both sides.

This purpose and view must have been before the Government of Ontario when it agreed to give Mr. Backus, and subsequently the Ontario & Minnesota Power Co. the right to build a storage dam and also before the Dominion Parliament when it passed the Act 4-5 Edward VII, chap. 139; but these legislative bodies knew that their powers were bounded by the dividing line between Canada and the United States and that if that dam were to be constructed, legislative authority would have to be obtained from Congress.

It is inconceivable that any other view of the situation could have been taken.

With such facts being in existence and of public notoriety, the Rainy River Improvement Co. obtained from Congress on the 24th February, 1911, an Act authorizing it "to construct, maintain, and operate a dam across the outlet of Lake Namakan at Kettle Falls."

Based upon this Act of Congress, the Rainy River Improvement Co., after having obtained the approval of its plans by the competent authority in the United States, makes the present application to the commission.

This application is governed by Article III of the treaty of May 5, 1910. Article IV of that treaty is confined in terms to "obstructions in waters flowing from boundary waters or in waters at a lower level than the boundary in rivers flowing across the boundary" and has no relevancy to applications for the use, obstruction, or diversion of waters that are strictly boundary waters within the definition of that term as found in the preliminary article of the treaty. Since there are no provisions in the treaty which confer independent, automatic jurisdiction on the commission save and except those contained in Articles III and IV, it follows that the jurisdiction of the commission to consider and determine the present application must be found, if found at all, in Article III of the treaty. That article, when supplemented by Article VIII, vests in the commission jurisdiction to approve or withhold its approval, or to grant its approval on conditions, to "uses or obstructions or diversions, whether temporary or permanent, of boundary waters, on either side of the line, affecting the natural level or flow of boundary waters on the other side of the line," and applications to the commission for its approval of uses, obstructions, or diversions of boundary waters must shew the proper uses, obstructions, or diversions to be of the kind and character described in the article in order to vest the commission with jurisdiction to act on the application. It is proper to observe in this connection that an international commission finds its authority to act in the treaty creating it or in supplemental treaties defining its powers, and that any action taken by it beyond the terms of the treaty, fairly construed, would be *coram non judice* and void. It would bind neither Government.

Now, looking at Article III of the treaty, its terms are plain, simple, and direct. They authorize the intervention of the commission in one class of cases, and one class only namely, uses, obstructions or diversions of boundary waters on either side of the boundary in such waters, which affect the level or flow of such waters on the other side of the boundary. The utility and propriety of such a treaty provision between the two countries arises out of the fact that each Government is supreme on its own side of the boundary in such waters for municipal purposes, and that uses, obstructions, and diversions of such waters, authorised by the respective Governments on their side of the line, often result in injurious consequences on the other side, thus leading generally to irritation and resentment, and in some cases to serious international controversy. By placing the entire matter under the control of an International Joint Commission, and requiring its consent to uses, obstructions or diversions of such waters on either side, and clothing it with power to make its consent to such uses, obstructions, or diversions on either side conditional on the construction of remedial or protective works on the other side, or on the making of suitable and adequate provision for protection and indemnity against injury to interests on the other side, it was sought to bring the uses of boundary waters on each side of the line under a common control, which should consider the rights and interests of the people of each country in every case, and, where necessary, make provision for their protection. Thus the rights of each nation would be amply protected and the possibility of irritating controversy would be entirely removed. The utility and propriety of such control is confined, necessarily to cases where either Government, acting singly on its own side of the line, authorizes uses, obstructions or diversions of boundary waters on that side which affect the level or flow of the waters on the other side, and hence the treaty in plain and unambiguous terms confines the power of the commission to that class of cases.

The principles governing our interpretation of this treaty or international contract are no other or different than those now universally applied in the interpretation of all contracts and agreements whether between private individuals or public authorities. The principle is frequently expressed by the phrase, "the true interpretation of the terms of a contract is the ascertainment of the intention of the parties, determined by the weight of competent evidence."

The only evidence of the intention of the high contracting parties to be considered by us is the provisions of the treaty itself. From a careful examination of these provisions we are unable to find that the two Governments intended to confer upon this commission jurisdiction or control over such an "obstruction" as a dam to be built in boundary waters from shore to shore across the international boundary line as here proposed, and we are compelled to hold that as the treaty now stands we have no jurisdictional power to act upon the application before us.

There is another aspect of the case which deserves attention. It has already been stated that the application of the American company is made in virtue of an Act of Congress approved February 24, 1911, while the Canadian company, viz, the Ontario & Minnesota Power Co. (Ltd.), bases its demand for approval of the application now pending before the Government of Canada on the power conferred upon it by the letters patent above recited and the Canadian Statute 4-5 Edw. VII, ch. 139.

It must be observed that in the two articles of the treaty above quoted exception is made of any works which have heretofore been permitted or may hereafter be provided for "by special agreement between the parties hereto."

Article XIII of the treaty defines what is meant by the term "Special agreement" used in Article III.

"Such agreements," says the treaty, "are understood and intended to include not only direct agreements between the high contracting parties, but also any mutual arrangements between the United States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion."

It is evident, from the reading of the Dominion statute, that the Parliament of Canada, when it enacted chapter 139 of the statute 4-5 Edward VIII, had before it the letters patent incorporating the Ontario & Minnesota Power Co. (Ltd.), and when it speaks of the powers of construction which the company "now has or may hereafter have," it clearly means the powers conferred upon it by the proper authority, viz, the government of the Province of Ontario, one of which powers is the construction of the dam at Kettle Falls.

After the passing of the Dominion Act, Congress gave its authorization, such as was necessary, to the construction of the dam by the Act hereinabove referred to.

As already stated, the powers conferred by the Dominion statute can only be exercised by the company after the plans of the proposed works have been approved by the governor in council. The operation of the Act is suspended until such approval has been obtained. It is reasonable to assume that both companies acting in conjunction and having a common object or purpose in view, the plans approved by the Governor in Council will be for the construction, not of a part of the dam, but of the dam across the river such as contemplated by the application. In other words, the plans to be dealt with by the Dominion authorities must, in order to meet the requirements of the situation and the wishes of the parties, correspond with each other. When this approval has been obtained and the Dominion statute brought into operation there will be a mutual arrangement "between the united States and the Dominion of Canada expressed by concurrent or reciprocal legislation on the part of Congress and the Parliament of the Dominion."

There will then be no dispute to be adjusted or settled for which purpose the treaty, according to the preamble, was passed.

The commission, in the present instance, is not dealing with a case of a supposed obstruction which extends further across than the boundary line in waters common to both countries, but with a concrete case of an application for the approval of a dam spanning the stream with abutments on the American and Canadian shores.

In such a case the construction of a dam is one which admittedly must be authorized by both Governments, and such authorization when fully granted will obviously exclude the necessity or propriety of any action by the commission. If the commission under the treaty has the power to approve the construction of a dam it must also have the power to disapprove, and obviously the two Governments did not intend to confer upon the commission the power to disapprove of a work the construction of which they had mutually authorized by legislative grant.

By the foregoing opinion it is not intended to hold that the construction of the proposed dam or the effects of such construction could not under the treaty be referred to the commission for its approval under Article IX at any time before final authorization by both Governments of the construction of the dam, or that in case the two Governments

do not agree upon the plans on which the dam may be built such plans may not be referred to the commission for its approval under said Article IX.

The application must be dismissed.

Opinion by Mr. Casgrain.

Mr. Tawney, Mr. Streeter, and Mr. Turner concur.

Mr. Powell and Mr. Magrath dissent.

The matter of the above application having been heretofore fully argued by counsel upon objections to the jurisdiction of the commission to hear and determine the said application, and, after full consideration, it appearing to the commission that it has no jurisdiction to hear and determine the said application, it is now

Ordered, that the same be, and hereby is, dismissed.

CONTEMPT OF COURT IN A HEAD-LINE.

The gist of the decision of the Divisional Court last week in the case of the *Pall Mall Gazette* is that a head-line in a newspaper may amount to a contempt of Court, as being calculated to interfere with the course of justice, although there be nothing in the printed matter to which the head-line refers which could afford sufficient ground for complaint. The *Pall Mall Gazette* had grouped together the head-lines relating to a writ in Chancery, issued by shareholders against the managing director of the Marconi Company (for libelling whom Mr. Cecil Chesterton was then undergoing his trial) with the other directors, in respect of certain dealings with American shares in which the Company was interested, and the head-lines referring to the criminal trial. It was said, on behalf of the *Gazette*, that newspapers frequently group together the head-lines relating to the same or kindred subjects; but the Court held that this practice could not justify the combination of the head-lines relating to the civil proceedings and to the report of the criminal trial, as it might tend to prejudice the minds of the jury trying the case. No doubt the head-lines may influence the reader, especially as in these days of hurry and hustle many men only peruse the contents of their newspapers in a very per-

functory fashion. But the prosecution was not, in fact, prejudiced, a conviction being secured against Mr. Cherterton, and, the gravamen of the offence being the mixing up of the criminal and civil proceedings as if they had some real connection, in fact the opinion of the Court was sufficiently marked by an order against the respondents to pay the whole costs of the proceedings—a heavy enough punishment, even if there was no wilful contempt.

Law Journal (Eng.)

TORT TO AN UNBORN CHILD.

It is believed no case can be found, in which recovery has been had by a child suing for negligence culminating in injury after birth. There are, however, several cases in which recovery has been claimed, in only one of which, however, does a Court hold squarely that an action for such an injury does not lie. An example of the principle that an action might lie is found in *Nugent v. Brooklyn Heights Co.*, 139 N. Y. Supp. 367, decided by New York Supreme Court in Appellate Division. Recovery was denied in this case, however, because it was said there was no relation of passenger between the defendant carrier and the then unborn plaintiff.

The case refers greatly to and quotes abundantly from *Walker v. Great Northern Ry. Co.*, 28 Irish Law Reps., Q. B. & Ex. Div. 69. In this case it is rather to be thought that three of the four Judges considered that no action would lie, whatever the character of the negligence, but it really went off on the ground of there being no relation of passenger between the carrier and the plaintiff in her pre-natal state. The Chief Justice said he wished it to be clearly understood that he does not go the length of saying that: "If a person, knowing that a woman is enceinte, willfully inflicts injuries on her with a view to injuring the child and the child is born a cripple, or after its birth becomes a cripple, owing to the injury so willfully inflicted, an action does not lie at the suit of the child so crippled."

This seems not a very large reservation, and one not altogether in accord with what we understand to be the spirit of American decision. Such would not qualify matters so greatly in favour of one guilty of wanton injury. We under-

stand the American rule to be, that contemplation of consequences is not narrowed greatly in favor of a wilful tortfeasor. In other words, American decision would not stop to inquire whether he knew a woman was *eniente* or not, nor whether there was "a view to injuring the child." We can understand very readily, therefore, that a judge making no broader exception than this would readily yield to the fact that a foetus was not a passenger, though it be admitted that a child too young to pay is a passenger, when accompanying its parent, or other person in whose care it is. *Austin v. Great Western Ry. Co.*, L. R. 2 Q. B. 442.

But how the New York Court can follow the Irish Court in this is not clear. It has been squarely held in this country, that a child accompanying another in whose care it is, is a passenger under its caretaker's ticket and here the rule of consequential injury is not so hedged about as in British decision. For cases as to child being a passenger see *Rawlings v. Wabash Ry. Co.*, 97 Mo. App. 515, 71 S. W. 534; *Ball v. Mobile L. & R. Co.*, 146 Ala. 309, 39 So. 584, 119 Am. St. R. 32.

Our observation seems pertinent in view of the following language by the New York Court: "To the conclusion that an unborn child is not in existence so as to be entitled to the protection of his person and his property, I dissent. It is not helpful to characterize its existence as fictitious as to property rights. The rights are accorded to it. The indisputable fact is that one is answerable to the criminal law for killing an unborn child, who to that end is regarded as *in esse*, and the further fact is that the unborn child, so far as the property interests are concerned, is regarded as an entity, a human being with the remedies usually accorded to an owner."

We confess to disappointment in seeing a Court proceeding so admirably and then turned away by saying that: "The (unborn) child in its distinct entity was not a passenger, and the company owed it no duty in the matter of safe carriage." How could want of "distinct entity" be any more assumed than in the case of a non-fare child accompanying a passenger in whose care it is?

In *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 48 L. R. A., 225, 75 Am. St. Rep. 176, the suit was by the child for negligence toward its mother in and about the plaintiff being born so as to cause it serious injury after its birth. The

case squarely denies all right of recovery upon grounds stated by one of the Judges in the Walker case, to the effect that a child before its birth is, in fact, a part of its mother and is only severed from her at birth, and that it is "a mere legal fiction" that it may be regarded as *in esse* for some purposes.

In Massachusetts the reasoning leaned to the Illinois view. It was held, however, that, whether this was the right view or not, an unborn child was not contemplated by the particular statute upon which the suit at bar was based. *Dietrich v. Northampton*, 138 Mass. 14.

It is to be noted that there was a dissenting opinion in the Allaire case. It claims that the question has never been squarely decided in England, and it is argued that it is not absolutely true that at all stages dependent upon her living. If there is, therefore, a distinct life there of gestation a child is so a part of the mother, that its viability is entirely a distinct entity and to this injury is done.

This reasoning, we think, accords best with American view, that where a wrong has been done mere technical considerations shall not forbid recovery. Whether we speak of the child's entity being a mere legal fiction or not, it is a fiction founded on a fact in nature and the supposed fiction, if invention in such a thing is necessary, is for the benefit of the child. A wrongdoer has no claim for objecting to its operation against him. The reason of the law prevents the vesting of estates in others, through this supposed fiction. Is it not much less to give it recognition against a tortfeasor, wilful or otherwise? Has not the state as much interest in the protection of one about to be born, in his pursuit of life, liberty and happiness, as in the case of one already born? The law of torts, we believe, has a wider sweep in this country than before 1776 in England, and the technical refinements of the common law, as to which Courts both English and American differ more than a hundred years thereafter, should not greatly control the latter in this kind of a case. We may well suppose that here is a subject for treatment under vastly different environment than obtaining prior to American independence. Some Courts seem afraid to accord relief if there may result a rule difficult of proper limitations—a seeming reflection upon their efficiency as tribunals of justice.—*New Jersey Law Journal*.

SUPREME COURT DECISIONS.

OCTOBER 14TH, 1913.

IN RE SECTIONS 4 AND 70 OF CANADIAN
INSURANCE ACT, 1910.

*Constitutional Law—Insurance—Foreign Company Doing
Business in Canada—Dominion License—9 & 10 Edw.
VII. ch. 32, secs. 4 and 70.*

Held, per FITZPATRICK, C.J., and DAVIES, J., that sections 4 and 70 of The Act 9 & 10 Edw. VII. ch. 32 (the "Insurance Act, 1912") are not ultra vires of the Parliament of Canada. IDINGTON. DUFF, ANGLIN, and BRODEUR, JJ., contra.

Held, per FITZPATRICK, C.J., and DAVIES, J., that section 4 of said Act operates to prohibit an insurance company incorporated by a foreign state from carrying on its business within Canada, if it does not hold a license from the Minister under the said Act, and if such carrying on of the business is confined to a single province.

Per IDINGTON, J.:—Section 4 does so prohibit if, and so far as it may be possible to given any operative effect to a clause bearing upon the alien foreign companies, as well as others within the terms of which is embraced so much that is clearly intra vires.

Per DUFF, ANGLIN, and BRODEUR, JJ.:—The section would effect such prohibition if it were intra vires.

Newcombe, K.C., and Lafleur, K.C., for Attorney-General of Canada.

Nesbitt, K.C., Aimé Goeffrion, K.C., Bayly, K.C., and Christopher C. Robinson, for Ontario, Quebec, New Brunswick and Manitoba.

S. B. Woods, K.C., for Alberta and Saskatchewan.

*Wagenest, for the Manufacturers' Association of Canada.
Gandel, for the Canadian Insurance Federation.*

OCTOBER 14TH, 1913.

IN RE INCORPORATION OF COMPANIES.

Constitutional Law—Incorporation of Companies—“Provincial Objects” — Limitation — Doing Business Beyond the Province—Insurance Company—“Insurance Act, 1910;” 9 & 10 Edw. VII. ch. 32, sec. 3 sub-sec. 3—Enlargement of Company’s Powers—Federal Company—Provincial Licence—Trading Companies.

By sub-sec. 11, sec. 92, of “The British North America Act, 1867,” the Legislature of any province of Canada has exclusive jurisdiction for “The Incorporation of Companies with Provincial Objects.”

Held, per FITZPATRICK, C.J., and DAVIES, J., that the limitation defined in the expression “Provincial Objects” is territorial and also has regard to the character of the powers which may be conferred on companies locally incorporated.

Held, per IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.:—That such limitation is not territorial but has regard to the character of the powers only.

Held, per FITZPATRICK and DAVIES, JJ.:—That a company incorporated by a provincial Legislature has no power or capacity to do business outside of the limits of the incorporating province, but it may contract with parties residing outside those limits, as to matters ancillary to the exercise of its powers.

Per IDINGTON, ANGLIN, and BRODEUR, JJ.:—Such company has, inherently, unless prohibited by its charter, the capacity to carry on the business for which it was created, in any foreign state or province whose laws permit it to do so.

Per DUFF, J.:—A provincial company may conduct its operations outside the limits of the province creating it, so long as its business, as a whole, remains provincial.

Held, per FITZPATRICK, C.J. and DAVIES, J., that a corporation constituted by a provincial Legislature with power to carry on a fire insurance business with no limitation as to locality has no power or capacity to make and execute contracts for insurance outside of the incorporating province, or for insuring property situate outside thereof.

Per IDINGTON, DUFF, ANGLIN, and BRODEUR, JJ.:—Such a company has power to insure property situate within or without the incorporating province and to make contracts within or without, the same to effect any such insurance. In respect to all such contracts, it is not material whether the owner of the property insured is, or is not, a citizen or resident of the incorporating province.

Held, per FITZPATRICK, C.J. and DAVIES, J.:—A provincial fire insurance company may make contracts and insure property throughout Canada by availing itself of the provisions of sec. 3, sub-sec. 3, of 9 & 10 Edw. VII. ch. 32 ("The Insurance Act. 1910") which is *intra vires* of the Parliament of Canada.

Per DUFF, and BRODEUR, JJ.:—Such enactment is *ultra vires* of Parliament.

Per IDINGTON, J.:—Part of said sub-section may be *intra vires*, but the last part providing for a Dominion license to local companies is not.

Per ANGLIN, J.:—The said enactment is *ultra vires*, except in so far as it deals with companies incorporated by or under Acts of the Legislature of the late province of Canada.

Held, that the powers of a company incorporated by a provincial Legislature cannot be enlarged, either as to locality or objects, by the Dominion Parliament, nor by the Legislature of another province.

Held, per FITZPATRICK, C.J. and DAVIES.:—The Legislature of a province has no power to prohibit companies incorporated by the Parliament of Canada from carrying on business within the province, without obtaining a license so to do from the provincial authorities and paying fees therefor, unless such license is imposed in exercise of the taxing power of the province. And only in the same way can the Legislature restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special trading powers, or limit the exercise of such powers within the province. DUFF and BRODEUR, JJ. *contra*.

Per IDINGTON, J.:—A company incorporated by the Dominion Parliament in carrying out any of the enumerated powers contained in sec. 91, and a company incorporated for the purpose of trading throughout the Dominion cannot be prohibited by a provincial Legislature from carrying on business, or restricted in the exercise of its powers, within the province, except by exercise of the exclusive jurisdiction to

make laws in relation to "direct taxation within the province." But a company incorporated under the general powers of Parliament must conform to all the laws of a province in which it seeks to do business.

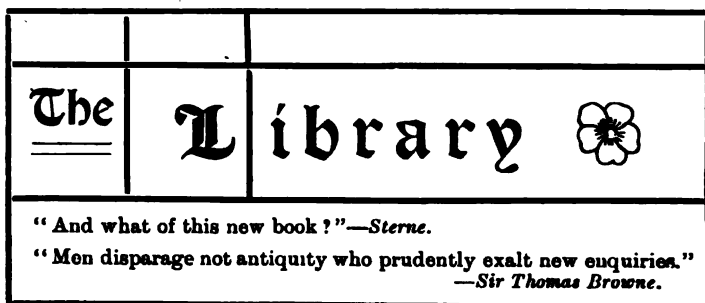
Per ANGLIN, J.:—The provincial Legislature may impose a license and exact fees from any Dominion company, if the object be the raising of revenue, or obtaining of information, "for provincial, local or municipal purposes," but not if it is to require the company to obtain provincial sanction or authority for the exercise of its corporate powers. And the Legislature cannot restrict a company incorporated for the purpose of trading throughout the Dominion in the exercise of its special powers, nor limit the exercise of such powers within the province, nor subject such company to legislation limiting the nature or kind of business which corporations not incorporated by it may carry on or the powers which they may exercise within the province.

Newcombe, K.C., and *Atwater*, K.C., for Attorney-General of Canada.

Nesbitt, K.C., *Lafleur*, K.C., *Aimé Geoffrion*, K.C., and *Christopher C. Robinson*, for Ontario, Quebec, Nova Scotia, New Brunswick, Prince Edward Island and Manitoba.

S. B. Woods, K.C., for Alberta and Saskatchewan.

Chrysler, K.C., for Manufacturers' Association of Canada.



Banks and Banking in Canada, 3-4 George V., chapter 9, with annotations, table of cases and copious index. By Walter Edwin Lear, of Osgoode Hall. Toronto: The Carswell Co., Ltd.

Mr. Lear has a peculiar faculty for work of this description, and the notes and index to the Bank Act will be found particularly useful to the profession. This handy little book should be in the hands of every practitioner.

Principles of the Law of Personal Property. By the late Joshua Williams, Esq., of Lincoln's Inn, sometime one of the Conveyancing Counsel to the Court of Chancery, and afterwards one of Her Late Majesty's Counsel. 17th edition, by his son, T. Cyprian Williams, of Lincoln's Inn, Barrister-at-Law, LL.B. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd.

The seventeenth edition of this volume, most valuable to the student in conveyancing as well as the older practitioner, has been brought up to date by the editor, the main statutory changes since the issue of the last edition being embodied.

A particularly useful section of the book is that which deals with the liabilities of chattels in relation to distress and a table of articles privileged has been added to the present volume. The editor had a difficult task in taking up the work of his late father and how well he has carried out his work, the utility and helpfulness to the practitioner is able to attest.

The Law of Trade Marks and Trade Names, with chapters on trade secret and trade libel, and a full collection of statutes, rules, forms and precedents. By D. M. Kerly, M.A., LL.B., sometime fellow and Macmahon law student of St. John's College, Cambridge, of the Inner Temple, Barrister-at-Law. Fourth edition by F. G. Underhay, M.A., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd. Toronto: The Carswell Co., Ltd.

The care and thoroughness called for in the preparation of a work of so technical a nature as the present volume is stupendous, and when the value and prestige of a trade mark is considered in relation to large mercantile and other concerns a work like the present cannot fail to be appreciated by those members of the profession to whom merchants look for advice.

The fact that the various Acts of the United States, Australia, and other countries have been included in the present edition makes the work somewhat of an international one. The law as settled by the decisions of the Court of Appeal and the Privy Council is set out in the present volume, which will undoubtedly be appreciated by every member of the profession having occasion to use it.

Chitty's Statutes of Practical Utility, with notes and indexes. Volume 17, part 3, containing statutes of practical utility passed in 1913. By W. H. Aggs, M.A., LL.M., of the Inner Temple, Barrister-at-Law. London: Sweet & Maxwell, Ltd., 3 Chancery Lane; Stevens & Sons, Ltd., 119-120 Chancery Lane.

Part 3 of Vol. 17, as the title would indicate, comprises those statutes of general use. The notes will be found very useful and the index is full enabling each subject to be easily found.

BOOKS RECEIVED.

A Treatise on the Law of Municipal Corporations. By Eugene McQuillan, author of *Municipal Ordinances*, and Judge of the eighth Judicial Circuit, Missouri, in six volumes. Callagan & Co., Chicago.

Commentaries on the Law of Master and Servant, including the modern laws on workmen's compensation, arbitration, employers' liability, &c., &c. By C. B. Labatt, B.A. (cantab.), M.A. (Toronto), of the Bar of San Francisco, Cal., in eight volumes. Rochester, N.Y.: The Lawyers Co-operative Pub. Co.

RECENT FICTION.

In Search of a Husband. By Corra Harris. The Copp Clark Co., Ltd., Toronto. Price, \$1.25.

The low moral tone of this book upsets one's preconceived ideas of the romance of the south, with its chivalrous men and beautiful and virtuous women. The local coloring is still the same and beauty is still an inherent quality of the women, but it is impossible to conceive that the present volume is anything but a distorted picture of what it purports to describe.

Miss Numé. By Onoto Watanna. The Copp Clark Co., Ltd., Toronto. Price, \$1.

This charming little love story pictures all those traits of character in recent years made known as inherent in the Japanese, both men and women, faithfulness, patience in suffering and unswerving devotion to an ideal. Numé San is the embodiment of this spirit in Japanese women, and the young Japanese aristocrat Orito Takashima exemplifies in himself the best traits of the old Samauri with his passion for the absorbing of knowledge.

The author is equally at home in her description of the other characters in the book, both men and women, but if one's reading of the best traditions of the Japanese nobility is correct, the reason given for the self-destruction of Takashima, father and son, and Omi, the father of Numé San, is insufficient, and the author in disposing of the characters in this way weakens what would be otherwise a very powerful story. This appears to be her difficulty in the ultimate disposal of all her characters and the reader is still uncertain at the end of the book as to the truth of the Japanese proverb "A Japanese flower has no smell, and a Japanese woman no heart." Yet withal the story is a charming one and will make a very acceptable present for the holiday season.





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